

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

GLORIA SCOTT AND *
DEANIA JACKSON *
* NO. 96-8461
VERSUS * DIVISION "I"
* SECTION 14
THE AMERICAN TOBACCO *
COMPANY, INC., ET AL. *
*
* * * * *

Transcript of proceedings before The
Honorable Richard J. Ganucheau, Judge Pro Tempore,
Civil District Court, Parish of Orleans, State of
Louisiana, 421 Loyola Avenue, New Orleans, Louisiana
70112, commencing on June 18, 2001.

* * * * *
Thursday Afternoon Session
May 1, 2003
1:05 p.m.
* * * * *

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1 I N D E X
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WITNESS: PAGE

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1 P R O C E E D I N G S

2 THE MINUTE CLERK:

3 All rise. Oyez, oyez, oyez, Civil
4 District Court for Orleans Parish, Division
5 "I," is now in session. Silence is
6 commanded. Please be seated.

7 THE COURT:

8 Good afternoon, ladies and gentlemen.

9 THE JURY:

10 Good afternoon.

11 THE COUNSEL:

12 Good afternoon, Your Honor.

13 THE COURT:

14 Mr. Wittmann, are you ready to proceed?

15 MR. WITTMANN:

16 Yes, Your Honor, we are.

17 THE COURT:

18 And what is on the program for this

19 afternoon?
20 MR. WITTMANN:
21 Your Honor, we have two depositions that
22 will be read in this afternoon: Dr. Peter
23 Hamill and Dr. Gio Gori.
24 The first deposition will be Dr. Peter
25 Hamill.
26 THE COURT:
27 Ladies and gentlemen, this is one of
28 those instances where a witness has been
29 deposed under oath. And the testimony is
30 going to be presented to you by a lawyer from
31 the defense side asking questions of this
32 gentleman, who is?

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1 MR. ORLANSKY:
2 Larry Orlansky.
3 THE COURT:
4 And you are to take it as though the
5 doctor who is being deposed is sitting in
6 this witness chair giving the answers that
7 this gentleman reads when the questions are
8 read. Understood? And then we'll have the
9 second with the same procedure.
10 Mr. Herman?
11 MR. RUSS HERMAN:
12 Yes, I'd just like -- it's a little
13 loud, I'm sorry -- I'd just like it clear
14 that the gentleman seated is not the witness
15 and is a lawyer chosen by Mr. Wittmann to
16 respond.
17 THE COURT:
18 Yes. Yes.
19 MR. WITTMANN:
20 To clarify further, Your Honor, the
21 lawyer sitting in that chair is my law
22 partner, Larry Orlansky.
23 Good afternoon, ladies and gentlemen.
24 THE JURY:
25 Good afternoon.
26 MR. WITTMANN:
27 Dr. Peter V. Hamill was the Chief
28 Medical Advisor with the United States Public
29 Health Service and was the medical
30 monitoring -- medical coordinator for the
31 1964 Surgeon General's Advisory Committee,
32 which was a group that prepared the first

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1 Surgeon General's report on smoking and
2 health in 1964.
3 (Whereupon the above-referenced
4 testimony is read back at this time as
5 follows:)
6 QUESTION: Good afternoon, Dr. Hamill.
7 ANSWER: Good afternoon.
8 QUESTION: What is your current
9 employment?
10 ANSWER: I'm a retired medical officer
11 of the United States Public Health Service.

12 I'm a professor in an adjunct capacity at the
13 University of Maryland Medical School.
14 QUESTION: What does "adjunct capacity"
15 mean?
16 ANSWER: It means that I'm only there
17 sometimes when I, you might say, want to be.
18 Adjunct, I think -- it's supportive. I was a
19 full professor, full-time, and I'm -- I'm
20 president of a private consulting firm in
21 environmental health and epidemiology.
22 QUESTION: What's the name of your
23 private consulting firm?
24 ANSWER: Hamill Associates,
25 Incorporated.
26 QUESTION: And where is it located?
27 ANSWER: In Whitehall Cove, Annapolis,
28 Maryland.
29 QUESTION: Are there any other employees
30 of the firm other than yourself?
31 ANSWER: Full-time?
32 QUESTION: Yes, sir.

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1 ANSWER: No. Everything is ad hoc.
2 QUESTION: What do you mean by "ad hoc"?
3 ANSWER: As whatever they -- whatever
4 the subject is.
5 QUESTION: What is the nature of the
6 consultation business of your consulting
7 firm?
8 ANSWER: Probably the largest bit is
9 undertaking epidemiologic studies to
10 determine if, we'll say, for -- usually a
11 corporation, not always, but usually a
12 corporation, to determine if X substance is
13 harming employees in any specific way.
14 I also do consulting with the U. S.
15 Government. We've done one -- finished one
16 big document under contract on registration
17 of death certificates, improving the quality
18 of same, with the National Center for Health
19 Statistics.
20 QUESTION: Dr. Hamill, am I correct in
21 thinking that you said you had retired as an
22 officer in the United States Public Health
23 Service?
24 ANSWER: Yes, sir.
25 QUESTION: When did you retire?
26 ANSWER: February 1978.
27 QUESTION: And could you give us a
28 description of your professional activities
29 since that time? And it may be you've
30 covered the areas already.
31 You've talked about being an adjunct
32 professor at the University of Maryland

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1 School of Medicine. You talked about your
2 professional consulting organization.
3 What other professional activities have you
4 engaged in since 1978?

5 ANSWER: I was visiting professor of
6 epidemiology at University of Massachusetts
7 in Amherst the first year. Then I came down
8 to Baltimore and was professor of
9 epidemiology in preventive medicine full-time
10 for two years.

11 As my consulting practice kind of grew,
12 I kind of -- So I was academic for three
13 years and then moved more into the
14 consulting.

15 QUESTION: Can you tell me, Doctor,
16 since 1978 what professional activities you
17 may have engaged in that will relate to
18 cigarette smoking and lung cancer?

19 ANSWER: My first year teaching,
20 probably, in graduate students in
21 epidemiology, it's -- they are included in
22 that -- my class notes, probably half or
23 two-thirds of both the fall and spring
24 semester were related to -- I was using
25 cigarette smoking and, most significantly,
26 relate smoking and lung cancer and other
27 things but mostly as the paradigm for
28 epidemiology. The notes are included in
29 there.

30 QUESTION: Merely because research is
31 being funded by a corporation with an
32 interest doesn't mean it isn't honest

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1 research; is that right?

2 ANSWER: Two negatives.

3 A corporation can fund research that is
4 honest, yes. Sure.

5 QUESTION: When you were working with
6 the U.S. Public Health Service, was that a
7 full-time job?

8 ANSWER: I was a career officer, yes,
9 sir. Medical officer.

10 QUESTION: Would you tell me your duties
11 generally just before you retired?

12 ANSWER: I was Chief Medical Advisor in
13 the National Center for Health Statistics,
14 part of the Public Health Service. I had
15 been with the Health Examination Survey with
16 technique and equipment, a lot of pulmonary
17 function testing development for fourteen
18 years right after starting -- right after the
19 smoking study. I stayed there for fourteen
20 years.

21 QUESTION: During that fourteen-year
22 period -- And we're talking approximately
23 1964 to 1978; is that correct?

24 ANSWER: Right. Correct.

25 They just finished, I guess, the most
26 expensive, biggest intervention -- that's
27 another one of the names, intervention trials
28 -- intervention studies in our history. In
29 the Public Health Service. So-called MRFIT
30 program, Multiple Risk Factors. It's an
31 acronym.

32 Went on for about ten years, fifteen

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1 major medical centers. Really good people
2 involved in this thing. Looked just
3 absolutely so good on paper. Come up with
4 ironclad experimental evidence. But, except
5 for a couple of small methodologic things,
6 I'm not sure if we learned much of anything.
7 They did find that guys would shift,
8 either consciously and unconsciously, shift
9 categories. They could almost demonstrate in
10 some categories that the guys who had the
11 intervention or the guys who didn't have the
12 intervention were being -- were adhering to
13 low-fat diets and, in some ways, cigarette
14 smoking cessation more scrupulously than the
15 guys that were chosen as the -- who had the
16 super therapeutic treatment stuff. A lot to
17 be worked out.

18 QUESTION: I'm sorry?

19 ANSWER: A lot to be worked out
20 technique-wise. If I could summarize, they
21 are a statistician's delight and an
22 epidemiologist's nightmare. They just don't
23 float. My boat-building imagery. They have
24 to be used pretty carefully.

25 QUESTION: So, if I understand, MRFIT
26 was a study intended to test a number of
27 different risk factors?

28 ANSWER: Yes.

29 QUESTION: Including cigarette smoking?

30 ANSWER: High-fat diet, cigarette
31 smoking and reduction of blood pressure.

32 Those three specific variables. In the

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1 incidence of -- Sounds real beautiful. I was
2 excited when I heard about it.

3 QUESTION: It was designed by very
4 competent people?

5 ANSWER: Yes.

6 QUESTION: What they intended to do,
7 when you say "intervention," is to get people
8 to change their habits? So that they got
9 people to change their smoking habits and
10 change their diet?

11 ANSWER: And it was called -- There are
12 ethical problems, too, because if you think
13 you've got something good, you can't let --
14 Your controls now, like with animals -- They
15 made a compromise by usual treatment by
16 physician as against super treatment by these
17 experts.

18 Kind of looked like the usual treatment
19 by a physician was all of a sudden taking off
20 on a much elevated plane. Not purposely, it
21 wasn't consigned. But they heard about the
22 study and they were giving, all of a sudden,
23 giving better treatment than they probably
24 gave before and maybe even better effective
25 treatment than the selected people were

26 getting.
27 QUESTION: But whatever the reason, I
28 gather that the results were that these
29 people who were intervened with and changed
30 their habits, like smoking, for example, came
31 out just as well healthwise or they didn't
32 show any improvement healthwise vis-a-vis the
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1 controls; is that correct?
2 ANSWER: Just about, yes. On this
3 particular subject, that's about it. Can't.
4 QUESTION: I believe you stated that
5 MRFIT was a statistician's delight and an
6 epidemiologist's nightmare?
7 ANSWER: Yes.
8 QUESTION: What did you mean by "a
9 statistician's delight"?
10 ANSWER: Well, what I meant by that was
11 it looks great on paper. You know, before
12 you start -- and if you've ever done any big
13 studies -- sounds good, good rules, high
14 levels of significance are going to come out
15 if everything works right.

16 But in the real world, which I consider
17 the craft of epidemiology, moving from there
18 to the real world, abridging, people just
19 don't lend themselves that readily to your
20 grand design.

21 QUESTION: And by that, you mean the
22 people with whom there was supposed to be
23 intervention may not have always done what
24 they were supposed to do and the control
25 group may not have continued their habits?

26 ANSWER: Of true control, yes.

27 QUESTION: Are you aware of the MRFIT
28 data regarding lung cancer?

29 ANSWER: Not on a -- Well, no, I'm not,
30 because the whole thing was geared for heart
31 and cardiovascular variables. Frankly, I
32 can't even imagine what kind of lung cancer

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1 data it would have.

2 QUESTION: It did have some on lung
3 cancer data; didn't it?

4 ANSWER: I don't know. I haven't sat
5 down with a -- I just don't know about that.
6 I haven't gone over it that finely. That
7 would be -- If they did, that would be what I
8 mean by something over here. That was not
9 one of its foci.

10 QUESTION: Dr. Hamill, how did you
11 happen to become involved in the preparation
12 of the Surgeon General's Advisory Committee
13 Report?

14 ANSWER: The Surgeon General -- As a
15 career officer, I was invited over to his
16 office and met with Dr. Terry and Dr. Hundley
17 and chatted for awhile with me. They
18 certainly knew a lot about me. Asked me how

19 I would -- how I would like to join this
20 activity after describing it a bit.
21 In those days, it's like the king when
22 you -- The request is a little more than a
23 volunteering. I said, "Yes, sir."
24 QUESTION: You became the medical
25 coordinator?
26 ANSWER: I was called various things,
27 but the name that sticks is the staff medical
28 coordinator. I was executive secretary,
29 scientific director, medical coordinator.
30 That was the name that stuck.
31 QUESTION: Had you done work in the area
32 of smoking and health that particularly

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1 qualified you for that position or were you
2 -- or was that a prerequisite of the
3 position?
4 ANSWER: I was the first chief of
5 epidemiologic study for the new air pollution
6 medical program in the Public Health Service.
7 And, as such, was trying to -- wonder about
8 all kinds of health effects of this thing
9 called air pollution. We didn't have it even
10 too well-defined.
11 But I'd been doing that for a couple of
12 years and I had formal training in
13 epidemiology and a lot of experience in chest
14 diseases, clinical. So they -- that's my
15 past relevant experience.

16 QUESTION: Would it be fair to say that
17 the appointment of the Surgeon General's
18 Advisory Committee was intended to try to
19 answer medical questions regarding the
20 tobacco and health controversy?

21 ANSWER: Try and answer the question of
22 what are the health effects of smoking, any
23 health effects of smoking. That we could
24 possibly answer it as thoroughly and best as
25 we possibly could. Yes, health effects is a
26 little broader maybe. But medical, you know,
27 yes, sir.

28 QUESTION: In fact, in a foreword to the
29 Surgeon General's Advisory Committee Report,
30 the Surgeon General states, does he not, that
31 few medical questions have stirred such
32 public interest or created more scientific

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1 debate than the tobacco --
2 ANSWER: Yes. Using that broad sense.
3 QUESTION: The purpose of the
4 appointment of the Surgeon General's Advisory
5 Committee was to try to find --
6 ANSWER: Try to clarify. Just clarify
7 the thing.
8 QUESTION: Who prepared the section of
9 this report referred to as "Acknowledgments";
10 do you recall, Doctor?
11 ANSWER: I was not there at the very

12 end. The last couple of months, I was not
13 there.
14 This would have been kind of a running
15 file of people. I started the file, and I'm
16 not -- One time I went back through it just
17 to check. I think it was a cumulative file
18 of helpers of various kinds.

19 QUESTION: Could you --

20 ANSWER: Some little and some big.

21 QUESTION: Could you tell me how the
22 advisory committees went about collecting
23 information that it used in its study?

24 ANSWER: Sure. Yes.

25 The first step -- It was kind of a
26 global charge, as you actually read that
27 sentence of the Surgeon General's. So we
28 were kind of obliged to, in a way, using
29 various techniques to review, you might say,
30 the world's literature.

31 That's -- This is -- was a rather
32 formidable task. We started off with a
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1 huge -- I call it the green monster, the
2 Larsson, Haag and Silvette book entitled
3 Tobacco. It was an extraordinary
4 bibliography. I think there were six
5 thousand items in it.

6 Then we were housed in the National
7 Library of Medicine, our offices. This was
8 in the days before there was computerized
9 retrieval and computerized lists of stuff.
10 Most stuff had to be done manually, by just
11 the way the monks did five hundred years ago.
12 By hand.

13 Charles Roos, who was the chief of the
14 reference section, medical reference section
15 of the library, he was designated as our
16 liaison. We had a lot of liaisons, and he
17 was one of the real valuable ones. Under his
18 guidance, the library developed a
19 bibliography that -- I think Larsson, Haag
20 and Silvette went up to '58. It was
21 published in '59 or '60. And they went from
22 '58 -- or picked it up from where Larsson,
23 Haag did up until '63. And used rather their
24 same format and the same -- the same
25 reference format as the Larsson, Haag.

26 Then we gradually -- It was a gradual
27 process. Committee members took
28 responsibility for preliminary sections of
29 development. As I say, it was gradual.

30 QUESTION: But you were telling us --
31 Why don't you tell us, if you will, Doctor,
32 how the advisory committee itself was

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1 selected?

2 ANSWER: How it came about?

3 QUESTION: Yes.

4 And, again, feel free to refer to any

5 documents.

6 ANSWER: This was kind of an exciting
7 task. It was a difficult task. I was
8 heavily involved. I had some guidelines from
9 the Surgeon General on meetings and promises
10 that he had made before I came aboard on --
11 This was going to be open-minded, fair,
12 unbiased. As unbiased as possible. Nobody
13 comes with an empty head.

14 QUESTION: What do you mean by
15 open-minded and unbiased for selection on
16 this committee?

17 ANSWER: On the issue of does smoking
18 cause lung cancer. If you already made up
19 your mind then, you know, you are essentially
20 ineligible. But you also want to have people
21 who know enough about the area so they are
22 capable of making a judgment.

23 It's kind of a little bit of a balancing
24 act. Then it kind of, in retrospect, it kind
25 of came out that a lot of the guys,
26 particularly with a lot of other things, they
27 kind of looked at this with one eye, in a
28 way.

29 Like even though I had been smoking, I
30 was still a smoker, I hadn't quite made up my
31 mind, not really, the really gut issue: Does
32 smoking cause lung cancer?

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1 QUESTION: You hadn't made up your mind
2 at that point in time?

3 ANSWER: No, no, no.

4 QUESTION: That was the way with all of
5 the people --

6 ANSWER: That was essentially what we
7 were trying to get: Guys that were capable
8 and knew enough about the surrounding area
9 but hadn't made up their minds. Frankly, one
10 of the ways I did it was I -- if a guy was
11 still a heavy smoker, that was a certain
12 amount of testimony that -- he both said he
13 hadn't made up his mind -- that was kind of a
14 formal proof.

15 QUESTION: When you say recommended by
16 everybody and TIRC, who is TIRC?

17 ANSWER: Tobacco Industry Research
18 Council. Clarence Cook Little. I got to
19 know him fairly well.

20 I ended up, even the substitutes, I
21 played all the names before anything was
22 announced over with Dr. Little and a couple
23 of the NTA and the Heart Association, even
24 though some of them hadn't been on the
25 original lists.

26 Sure, he agreed to everybody. Burdette
27 came on. Spiegelman, he was the chief
28 actuary of Metropolitan Life. And he almost
29 came on and then he withdrew and said that
30 Metropolitan thought it might be a compromise
31 or something in there, a conflict of interest
32 or something. Tukey would not come on. He

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1 was Princeton and Bell Telephone Labs. Bill
2 Cochran of Harvard was a substitute there.

3 That's all the people. There was a
4 question of eligibility on, you might say,
5 blackballing by the four or five different
6 groups or non-blackballing and then a
7 positive thing of enthusiasm. But some of
8 the senior guys I would talk to and --

9 QUESTION: When you say senior guys you
10 would talk to, who are you referring to?

11 ANSWER: Both Dr. Terry, Dr. Hundley,
12 Dr. Endicott. The reason -- One of the
13 reasons -- It wasn't just that they were
14 senior, but they had been using advisory
15 committees for ten or fifteen years. They
16 knew a lot of the guys in the country and
17 also knew how advisory committees work.

18 And there was one guy that was
19 recommended -- I will tell a story, I won't
20 say who it was -- but Endicott told me that
21 he had to dissolve his entire advisory
22 committee just to get rid of that one guy.
23 There was no way they could function with
24 that guy there. He was just -- He just
25 restarted all over again. I got information
26 like that.

27 QUESTION: Doctor, if I could summarize
28 your testimony on this, basically what you
29 did -- and correct me if I'm wrong -- is you
30 would gather names in various disciplines of
31 medicine and science from a number of
32 organizations that people would suggest as

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1 appropriate for this committee, then you
2 would review those names with other
3 organizations, review them with senior people
4 with the Public Health Service, and if there
5 was no serious objection, you'd rank them and
6 propose them to the Surgeon General; is that
7 correct?

8 ANSWER: I'd say so, yes. I relied
9 heavily on Hopkins, because I had been there
10 and I knew a lot of the senior people there.
11 They were very helpful. Yes, I think
12 that's -- Yes.

13 QUESTION: Your objective was to seek
14 people who had not made up their mind on the
15 questions that this committee was being
16 appointed to try to answer?

17 ANSWER: That was one of the objectives.
18 As I stated there, my objective was to get
19 the brightest people I could get.

20 QUESTION: Get highly qualified people
21 that hadn't made up their minds?

22 ANSWER: Right. Both experienced and
23 intelligent.

24 QUESTION: One of the groups that you
25 referred to as suggesting names and that you

26 checked with was the TIRC, The Tobacco
27 Institute Research Committee?
28 ANSWER: Right. The director was
29 Clarence Cook Little.
30 QUESTION: Did Dr. Little cooperate with
31 you in this process?
32 ANSWER: Yep. He had very sultry
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1 remarks about people. He was always very
2 helpful.
3 QUESTION: You also solicited names and
4 comments from groups such as the -- Well,
5 tell me the names.
6 ANSWER: The groups -- I didn't do the
7 original soliciting. That was given to me.
8 The -- Not tuberculosis. The American Heart
9 Association, American Cancer Society, TIRC
10 and -- There were a total of five.
11 I can't -- I was given a list of -- And
12 Public Health Service, yes. I was given
13 these lists. That's what I kind of started
14 with. I went through them, ran into a couple
15 of blackballs, and had to replenish them a
16 little bit.
17 QUESTION: Once this committee was
18 selected, then how did they go about
19 gathering the information that was necessary
20 to try to answer the questions arising from
21 the tobacco and health controversy?
22 ANSWER: What if I tried to sketch it?
23 What do you want?
24 QUESTION: A sketch would be fine and
25 then we'll fill in the areas with -- that are
26 appropriate.
27 ANSWER: Okay. This was fairly big. I
28 remember things fairly well. Got the
29 documents. We got a small staff machinery in
30 place in the National Library of Medicine,
31 which was a very fortunate place for
32 resources.

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1 Those are the days when Xerox machines
2 were pretty scarce to come by, too. I worked
3 up some background documents for a first
4 meeting. They are included in there. I had
5 gone over them with both Dr. Hundley but,
6 primarily, Dr. Bayne-Jones. He ended up
7 becoming a very close advisor. These were
8 kind of trying to grow out -- trying to grow
9 out alternatives.
10 It was stuff for them to get started on.
11 How did they want to conduct the study? The
12 Surgeon General stated at the very beginning
13 of the first meeting, "Gentlemen, it's your
14 study. You take as long as you need. I will
15 not allow anybody to interfere with either
16 your procedure or the length of time of your
17 study. You come up with whatever -- The
18 decision is yours."

19 I had had a couple of months, you might
20 say, head-start thinking about this and how
21 they might proceed on with this study.
22 Several different ways. They could be rubber
23 stamp because the Royal College of Physicians
24 had just come out with a report about eight
25 months before or six months before, which was
26 a good report. It wasn't a great report; it
27 was a good report. And it might have -- That
28 was one of the alternatives.

29 They could have read that, thought about
30 it a little bit and say, "We endorse it."

31 But the Royal College of Physicians were
32 Englishmen; we are Americans. We are going
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1 to outdo them.

2 There were -- Another alternative was
3 the Public Health Service do most of the
4 work, most of the staff work, work up the
5 literature, work up the scientific papers.
6 And then they take them for argument, for
7 consideration, and either approve or
8 disapprove and modify as they saw fit.

9 The third major alternative was the
10 committee themselves to somehow, and in some
11 yet specified degree, take on the
12 responsibility themselves within the
13 constraints of their time, their obligations,
14 their university and so forth.

15 That's -- The latter is what --
16 Essentially, it took them six months to the
17 main meeting -- took them six months to kind
18 of make that decision. They did make that
19 decision.

20 It wasn't the Surgeon General's report.
21 That's published. The thing you are reading
22 is not the Surgeon General's report. It's a
23 report of the advisory committee to the
24 Surgeon General. I think that's an
25 extraordinarily important distinction.

26 QUESTION: Why do you feel that's
27 important, Doctor?

28 ANSWER: Because of the charge that the
29 Surgeon General both had given them and the
30 autonomy he had given them. It was autonomy.
31 I really don't know today what would have
32 happened if we had something that surprised

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1 or was contrary to what the Surgeon General
2 believed as a medical scientist. I really
3 don't know. But I never will know, of
4 course.

5 I don't know. That's kind of like -- In
6 a way, it was kind of like where your kids
7 graduate from college and they go away. That
8 was kind of what he gave -- the autonomy he
9 gave the committee.

10 QUESTION: He gave you the freedom --
11 the committee the freedom to make their own

12 decision?
13 ANSWER: Both operating decisions and
14 content, both. He abridged later on, I have
15 to say, the time. He did do that. There was
16 some -- There was a crunch. That was --
17 There was some complaining about that.

18 Originally, there was no time limit. He
19 said, "Well, I don't want you to take ten
20 years." He said something like that. It's
21 in the first two minutes. But it did come
22 down politically that it would be greatly
23 appreciated by, I guess -- I presume The
24 White House or somebody in the -- if the
25 report could come out the calendar year of
26 1963, which was the following year. In other
27 words, it should have been a little less than
28 a year and a half.

29 At first, it wasn't a -- it wasn't a
30 directive because he really couldn't give a
31 directive because he already made the other
32 statement. But it was tough on a lot of

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1 people involved. In fact, one time I thought
2 a couple guys might get up and leave,
3 frankly. It was in the main meeting and it
4 was -- Finally, they asked -- That's the
5 first executive session.

6 First, they had everybody vote -- but
7 Dr. Hundley and me not vote -- and went over
8 where they wanted to clarify some of the
9 terms again.

10 QUESTION: What terms were they trying
11 to clarify?

12 ANSWER: The terms of what are the
13 conditions of the study. Seeing if everybody
14 remembered rightly and when does this thing
15 have to be done.

16 QUESTION: I'm sorry?

17 ANSWER: When does this thing have to be
18 done.

19 QUESTION: I see.

20 ANSWER: Which is extremely important
21 when you get a massive, massive job like
22 that.

23 Then they asked Dr. Hundley and me to
24 step out. And, apparently, they --
25 apparently, they had pretty good -- they let
26 their hair down. That's when they became a
27 real honest-to-God committee. They weren't
28 beholding to a Surgeon General or an
29 organization but to each other.

30 They were kind of like as we learn
31 something about football teams. They got
32 some agreements and commitments and guys

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1 started to commit to obligations. Some of
2 the commitments were legally quite severe
3 because some of the guys -- were really quite
4 severe because some of the guys had to take

5 off a couple of months on scheduled time from
6 the university to finish parts of their
7 report.
8 QUESTION: And you speak of the study as
9 having two phases; is that correct?
10 ANSWER: Yes, sir.
11 QUESTION: And it was your view that the
12 study should be limited to Phase I, Phase I
13 being to determine the nature and magnitude
14 of the health effects of smoking, and not
15 involve yourself with Phase II, which would
16 be for recommendations of action?
17 ANSWER: Absolutely correct. But that
18 was given to me. That was -- That decision
19 was made by the Surgeon General in those
20 prior meetings with the White House and the
21 big advisory groups.
22 QUESTION: And you felt --
23 ANSWER: I thought it was a good idea,
24 yes.
25 QUESTION: In fact, you felt, didn't
26 you, that it was a major defect in the Royal
27 College of Physicians' study because they
28 mixed the two?
29 ANSWER: Yes, I did. I very definitely
30 did.
31 QUESTION: However, the Surgeon
32 General's Advisory Committee got the
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1 materials of which -- on which they based
2 their decisions?
3 ANSWER: All right. One of the chief
4 mechanisms -- And a lot of the people in the
5 acknowledgments were asking highly capable
6 guys on the outside, I mean, weren't on the
7 committee but almost all of them are
8 university-based in some way, to write, you
9 might say, a staff paper. Work up all the
10 literature, we'll say, on exposure of --
11 occupational exposure and lung cancer without
12 even considering -- well, with or without
13 considering smoking. Primarily, arsenic and
14 chromium, nickel and so forth.
15 I asked most of them not to be too
16 judgmental. Be analytical but not -- give me
17 some judgmental, but telegraph your judgment,
18 that that's your judgment. These were
19 reliable people. Sometimes we would have two
20 done on the same area. You can't be too
21 reliable.
22 And these were helpful for doing what I
23 call a lot of the scud work in working up
24 literature so you don't miss something.
25 Either the person himself or just his paper
26 would be presented to the committee as a
27 whole for discussion, evaluation. See where
28 it could kind of fit in a possible picture.
29 To decide whether we needed more work, more
30 clarification in this particular area or we
31 could set there and pick up another piece of
32 the puzzle.

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1 Areas were kind of, you might say,
2 unevenly developed. Unevenly in time. Some
3 went very rapidly and others dragged on.

4 But some of the dragging were
5 understandable in the sense that if they were
6 highly synthetic areas, in other words, if
7 they were synthesizing overall a whole bunch
8 of other things, they couldn't do that until
9 these -- until the floor was all built;
10 right? They couldn't do the roof until the
11 floor was built.

12 And the other major time determinant
13 that we had no knowledge or control of, but
14 it was a question of when they wrote back to
15 the President, a memo to the President, I
16 think, in May. One of the time constraints
17 that we had, if we were going to use the
18 three major prospective studies, Hammond's,
19 Harold -- and Harold had just died that June,
20 May or June -- and Richard Doll.

21 They had all agreed to -- None of them
22 were, by the normal process of events, were
23 ready to mature. Like the apple wasn't quite
24 ripe yet. But they all agreed to tap in
25 where they were and cut off there, which they
26 did. Supplied us with the data. We -- It
27 was determined by -- There was no way -- We
28 had the National Center for Health
29 Statistics, some of their top guys working
30 there, and there was no way to finish up by
31 November. It was -- It just couldn't be
32 done.

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1 We either had to drop that, drop the
2 whole thing, and nobody wanted to do that.
3 So that was the kind of overall time
4 constraints. Then everything else had to
5 kind of fit in underneath there timewise.

6 QUESTION: In regard to time, when were
7 you initially interviewed by Dr. Terry for
8 your job with the committee?

9 ANSWER: Somewhere in the early or
10 middle of July 1962.

11 QUESTION: Is that when the activities
12 regarding the Surgeon General's Advisory
13 Committee really got started or had there
14 been some activity before then?

15 ANSWER: Only background activity.

16 In my -- I haven't studied this area
17 very much because I wasn't that -- I knew
18 what the givens were. I think they started
19 in about the previous year in discussions
20 with different -- some of these different
21 advisory groups.

22 But in January -- I think it was
23 January -- things started getting a little
24 more serious. And I do know and -- that one
25 of the things that put a real impetus on

26 things was Senator Maureen Newberg, whose
27 husband had died of lung cancer or -- I'm not
28 sure. He had been the senator and she took
29 his place from Oregon or something like that.
30 She was a pretty wild lady, pretty active and
31 vigorous. And people trying to -- tried to
32 keep their distance from her a little bit,

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1 her enthusiasms, let's put it that way.

2 She was kind of trying to have a
3 congressional study or congressional kind of
4 investigation to make on -- to put, in other
5 words, would be considered kind of a
6 three-ring circus. I think that gave a great
7 impetus timewise to get something -- the ball
8 rolling. When Dr. Terry made up his mind, I
9 don't know, really.

10 QUESTION: But at least at the time you
11 were called in and were consulted and you
12 started work, they hadn't even selected the
13 committee as yet?

14 ANSWER: No, sir. No, no, no. They had
15 that first list of recommendations from the
16 outside, from the five groups. That's all
17 they had.

18 QUESTION: Did the Surgeon General's
19 Advisory Committee actually do any research
20 or have any research done for them?

21 ANSWER: Research meaning what? New
22 studies?

23 QUESTION: New studies.

24 ANSWER: No. That was all -- In the
25 first meeting, that was decided to be out of
26 the charter. Because if you start once, then
27 literally there would be no end. Because all
28 of us are research oriented.

29 QUESTION: So what you did or what the
30 Surgeon General's Advisory Committee did was
31 rely on published literature and maybe gain
32 some information from some studies that were

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1 in progress; is that correct?

2 ANSWER: And unpublished literature.

3 QUESTION: And by that, I gather, then,
4 what this section of "Acknowledgments" in the
5 1964 report is about, that's how that
6 occurred?

7 ANSWER: This is the whole collection
8 of -- It's almost everybody we talked to that
9 helped us in whole -- in a variety of ways.
10 Some were formal consultants.

11 Obviously, Pete Lorillard wasn't a
12 consultant. Gave some information. So you
13 don't -- Different people did -- This list
14 includes --

15 QUESTION: This was a list of people
16 that the advisory committee wanted to thank
17 for their contributions to the report; is
18 that correct?

19 ANSWER: Yes, I would say that's -- Yes,
20 I would say that's a fair characterization,
21 yes.

22 QUESTION: Now, among this list there is
23 a George V. Allen, President and Executive
24 Director of The Tobacco Institute, Inc.,
25 Washington, D.C.?

26 ANSWER: Yes.

27 QUESTION: Did you have any contact with
28 Mr. Allen?

29 ANSWER: Yes, sir.

30 QUESTION: Would you describe that for
31 us, please.

32 ANSWER: Probably had a couple of phone
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1 conversations. And then he got one of the
2 best characterizations of the -- it's one of
3 the documents in there -- of the history of
4 the use of tobacco. I don't know who he --
5 where he -- how he cooked it up and sent it
6 to us. It was enormously valuable.

7 That's essentially my contact. My
8 contact for almost everybody was on a
9 technical -- Whoever could give us
10 information, that was it.

11 QUESTION: So he provided you what you
12 asked him to?

13 ANSWER: Very definitely, yes.

14 QUESTION: Do you know of anybody else
15 connected with the work of the advisory
16 committee on smoking and health that
17 contacted Mr. Allen?

18 ANSWER: I don't know, but I -- No, I
19 don't know.

20 QUESTION: As far as you know, no one
21 else did?

22 ANSWER: No.

23 QUESTION: There is also --

24 ANSWER: I mean, Mr. Allen was a big
25 wheel, as far as I was concerned. And -- I
26 don't know -- maybe the Surgeon General
27 talked to him. I don't know.

28 QUESTION: There is also listed here an
29 Arthur D. Little, Incorporated from
30 Cambridge, Massachusetts. Did you have
31 contact with this company?

32 ANSWER: Yes, sir.

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1 QUESTION: Would you tell us about that,
2 please?

3 ANSWER: I think it was either Dr.
4 Little or Dr. Hockett at TIRC suggested to us
5 that Charley Kensler was a first-class
6 pharmacologist, was doing some -- he worked
7 at -- I think he was the Chief of the Life
8 Sciences or one of those kinds of names that
9 Arthur D. Little -- He was working on cilial
10 toxicity, which was of a lot of interest.

11 So I went up. And every time he went

12 somewhere like that, I purposely got somebody
13 on the committee, not just another
14 consultant, but that was a way to get them
15 more involved. I think -- I just can't
16 recall -- I think a couple of guys went with
17 us. We were impressed with Kensler's lab,
18 what he was doing and the way he does work.

19 And he came down a couple months later
20 and made a special presentation. That's one
21 of the things I mean by work in progress.
22 Because when we say it was still all a work
23 in progress. He got enough stuff together to
24 make a coherent presentation. And it was a
25 first class presentation, you know, to the
26 whole committee.

27 QUESTION: Was it Dr. Kensler?

28 ANSWER: Yes.

29 Somebody came with him, and I don't --
30 I've got it in my notes somewhere, but I
31 can't remember the other -- His, I think it
32 was his assistant.

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1 QUESTION: Did Dr. Kensler and the
2 Arthur D. Little organization cooperate fully
3 with the advisory committee?

4 ANSWER: Yes.

5 QUESTION: Now, there is also listed
6 here a Dr. -- Well, I shouldn't say. There
7 is Dr. Robert Hockett, Dr. Clarence Cook
8 Little and then The Tobacco Institute
9 Research Committee?

10 ANSWER: Right.

11 QUESTION: Did you have contacts with
12 those gentlemen from that organization?

13 ANSWER: Quite a bit. The papers, both
14 some letters, I think there must be five, six
15 letters both between me and Dr. Little and me
16 and Dr. Hockett. And Dr. Little finally
17 detailed Dr. Hockett to be at our disposal
18 for whatever you do.

19 And our first use was -- Well, it was
20 really helpful. Because they have been in
21 the field for eight years.

22 I mentioned before the enormous problem
23 of references and bibliography. And Mr. Roos
24 from the National Library of Medicine, the
25 one that was working with us, the great
26 reference man, he and I went up there and
27 spent a day or a couple days seeing how they
28 cataloged all the material.

29 They had been collecting material, and
30 they had an absolutely staggering collection.
31 I was impressed by the fact that they could
32 retrieve it better than we seemed to be able

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1 to. So we went up there and talked to their
2 librarian, their executive officer, to get
3 some pretty darn good ideas on how to
4 proceed. And then they offered to send us

5 any reprints we requested.
6 QUESTION: Did they send you some
7 materials?
8 ANSWER: They sent some materials, yes.
9 Sometimes it was more than I could ever read
10 at night.
11 QUESTION: But they cooperated fully
12 with the committee?
13 ANSWER: Sure did.
14 QUESTION: Were you impressed with them
15 as scientists?
16 ANSWER: I was very impressed with Dr.
17 Little. Dr. Hockett was nice. I really
18 don't know how good Dr. Hockett was. He was
19 always pleasant. He was helpful as a
20 scientist. He was no world beater.
21 QUESTION: Also listed here, I notice
22 the company Liggett & Myers, Inc. Did you
23 have any dealings with them?
24 ANSWER: One company -- I'm asking for
25 -- One company was paying -- was underwriting
26 the work at Arthur D. Little. I don't
27 remember -- They didn't go with the TIRC. It
28 was either Lorillard or Liggett & Myers. I
29 just don't remember which.
30 QUESTION: Did you have dealings with
31 that company?
32 ANSWER: Not directly. I didn't have
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1 dealings with any -- I've asked Dr. Hundley
2 to handle all tobacco companies.
3 QUESTION: Who did?
4 ANSWER: I asked Dr. Hundley.
5 QUESTION: What was his role with the
6 advisory committee?
7 ANSWER: He was called -- His title was
8 the Assistant Surgeon General. He was kind
9 of the Surgeon General's alter ego in many
10 things. I think his title on the committee
11 was Chairman Pro Tem, which meant, in fact,
12 that he chaired a good many of the committee
13 meetings. The Surgeon General chaired --
14 He'd start chairing the first two or three, I
15 forget, and then Hundley did the rest.
16 QUESTION: Dr. Hundley dealt with all
17 the tobacco companies?
18 ANSWER: The ones that I -- Whatever
19 ones -- I ran -- I was getting a lot of -- I
20 would get -- I was getting calls and I was
21 getting letters. I finally sent them all
22 downtown. He said, "You send them to me" and
23 he'll take care of it. I instructed all my
24 secretaries, "Don't even bother with me
25 anymore." There was one company that was
26 bugging us a lot.
27 QUESTION: Do you remember who that was?
28 ANSWER: No.
29 QUESTION: When you say "fighting us,"
30 what do you mean?
31 ANSWER: I didn't say, "fighting." I
32 said, "bugging us a lot."

1 QUESTION: In what regard, Doctor?

2 ANSWER: As far as trying to communicate
3 or trying to get information to us. I think
4 it was one of their ex-researchers who was
5 freelancing and wanted to -- I couldn't find
6 it in my stuff. I thought about it, but he
7 was -- he made a lot of contacts with me and
8 he was trying to get on our staff. That's
9 why I asked Dr. Hundley to handle everything
10 to do with the -- from then on, except I
11 stayed with TIRC because that was a
12 professional relationship.

13 QUESTION: So this fellow, was he acting
14 on behalf of the company or do you know?

15 ANSWER: I really -- I asked the company
16 and they didn't know.

17 QUESTION: But, anyway, what he was
18 trying to do was provide more information, be
19 involved in the process, was making himself
20 something of a, would you say, a pest of
21 himself?

22 ANSWER: Yes.

23 As far as our -- working that many hours
24 a day, you don't need anything like that.

25 QUESTION: I do note that P. Lorillard,
26 Liggett & Myers and Philip Morris, Inc. all
27 appear in the "Acknowledgments" as having --

28 ANSWER: American Tobacco?

29 QUESTION: I was just looking at the
30 companies that are in this lawsuit, and they
31 all appear. And the committee expresses
32 gratitude and appreciation to them for their

1 cooperation?

2 ANSWER: Yes. I didn't write that, so
3 I --

4 QUESTION: But that's what is reflected
5 here in the "Acknowledgments"?

6 ANSWER: Yes.

7 QUESTION: In your memorandum to Dr.
8 Hundley concerning your visit with Dr.
9 Little, you state: My impression of Dr.
10 Little is that of one of the most estimable
11 men I have ever met. For the past four
12 years, I've heard rumors that he was the soul
13 of integrity and, also, that he had been one
14 of the true giants in the biological sciences
15 but that he was wearing his dotage and was a
16 mere figurehead in the TIRC.

17 After discussions of about twelve hours
18 on Monday and another six hours on Tuesday,
19 my impression was that the first two items
20 were entirely accurate but the last two items
21 were not quite accurate. Granted, he's 73
22 years old (and I have no firsthand
23 comparative knowledge of his capacities
24 twenty years ago) but he certainly seemed
25 remarkably alert and incisive. Furthermore,

26 I'm absolutely satisfied that he is much more
27 than a figurehead for the TIRC efforts.
28 His functions as a scientific director
29 of the TIRC are twofold. On the one hand, he
30 is an eminent scientist who has been working
31 on cancer in animals for 53 years and has
32 been studying the tobacco and health

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1 arguments for eight years.

2 On the other hand, he acts as a buffer
3 between the tobacco companies themselves and
4 the objective twelve-man Scientific Advisory
5 Board of TIRC (i.e., enabling the SAB to
6 review and award the research grants in an
7 atmosphere of, quote, complete scientific
8 freedom, closed quote, like the NIH Advisory
9 Council), period.

10 Does that accurately reflect your
11 statements in your memo to Dr. Hundley?

12 ANSWER: Yes, sir.

13 QUESTION: That was your view at that
14 time?

15 ANSWER: Yes, sir.

16 QUESTION: And your view has not changed
17 to today; has it?

18 ANSWER: No, sir.

19 QUESTION: My question, I believe, was
20 could you explain to me what is meant by the
21 statement: The methodology has not been
22 developed yet to produce these answers?

23 ANSWER: Yes.

24 Say, by the lacunae, that means the
25 state-of-the-art, you'd like them to know
26 some stuff.

27 QUESTION: I'm sorry?

28 ANSWER: You'd like to know some stuff.

29 But the state-of-the-art, either software or
30 hardware, just can't measure it either
31 accurately enough or it's just not there.

32 That's the term, "state-of-the-art."

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1 QUESTION: What answers were you
2 referring to? The methodology is not
3 developed yet to produce these answers?

4 ANSWER: In the field I was working in
5 was chronic lung disease and pulmonary
6 function, it was not refined enough to -- yet
7 -- we knew it was going to be, but it was not
8 refined enough yet to discriminate different
9 populations of people satisfactorily.

10 Clinically, we were quite sure there was
11 a difference. Pulmonary function tests --
12 Later on, they could discriminate them very
13 nicely. That's what I mean by -- But
14 methodology can also be study methodology,
15 software or, for example, yesterday's subject
16 of intervention trials or clinical trials
17 that we talked about. Three kinds of -- They
18 weren't even invented yet to any kind of

19 usable degree.
20 QUESTION: So do I understand that to
21 mean there was not a standard accepted in the
22 medical community for determining the
23 causation of chronic diseases?
24 ANSWER: Absolutely correct.
25 So in order to reach satisfactory
26 inference-making rules, in other words, to
27 try to make causal determinations in the area
28 of cigarette smoking and health, the Surgeon
29 General's Advisory Committee had to develop a
30 standard on causation.
31 QUESTION: Is that correct?
32 ANSWER: That's what it looked like to
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1 me as of October 1962, yes, sir.
2 QUESTION: Because there was no standard
3 that could be used at that time?
4 ANSWER: There was none.
5 QUESTION: Did members of the medical
6 community at that time, some members, contend
7 that you should have to meet the standard of
8 Koch's postulates in order to make these
9 determinations?
10 ANSWER: That was stated by some people,
11 yes, sir.
12 QUESTION: At least insofar as the
13 specificity of association?
14 ANSWER: That was stated by some people,
15 yes, sir.
16 QUESTION: Do you agree that nonsmokers
17 get lung cancer?
18 ANSWER: Yes.
19 QUESTION: Do you agree that smoking
20 cannot be considered a necessary factor in
21 the production of the disease?
22 ANSWER: Yes.
23 QUESTION: Is there any disagreement, to
24 your knowledge, in the scientific community
25 on those two points?
26 ANSWER: What do you mean by the
27 scientific community? I'm not trying to
28 quibble.
29 QUESTION: What I mean is generally and
30 the scientists who study and work in this
31 area.
32 ANSWER: And who are reputed to know
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1 something?
2 QUESTION: Yes, sir.
3 ANSWER: Is that a qualification?
4 QUESTION: Yes, sir.
5 ANSWER: I think I would agree with that
6 statement.
7 MR. WITTMANN:
8 Thank you very much, Dr. Hamill.
9 (Whereupon the readback of the above-
10 referenced testimony is concluded at this
11 time.)

12 MR. WITTMANN:
13 Your Honor, that concludes Dr. Hamill's
14 testimony. And I do not yet see Dr. Gio
15 Gori.
16 Is there something you have to read,
17 Walter?
18 MR. LEGER:
19 Excuse me?
20 MR. WITTMANN:
21 Is there something you have to read?
22 MR. LEGER:
23 Yes, Your Honor.
24 We just wanted to point out the date,
25 the fact of the date of the deposition and
26 the case name of the deposition.
27 THE COURT:
28 You may do that.
29 MR. LEGER:
30 If that's all right.
31 Would you like me to do that, Mr.
32 Wittmann?

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1 MR. WITTMANN:
2 We can do that.
3 The depositions were taken on November
4 the 25th, 1985 and November the 26th, 1985 in
5 the Cipollone case, not in this case.
6 MR. LEGER:
7 Not in this case.
8 And that's actually a trial transcript
9 in 1985.
10 MR. WITTMANN:
11 Correct.
12 (Whereupon a discussion was held off the
13 record.)
14 MR. WITTMANN:
15 I've got one more section. I'm sorry.
16 All right. There's another segment,
17 Your Honor, from August 25th, 1987 in the
18 Cipollone case as well.
19 Are you on that page, Larry?
20 MR. ORLANSKY:
21 Yes.
22 MR. WITTMANN:
23 Okay.
24 (Whereupon the above-referenced
25 testimony is read back at this time as
26 follows:)
27 QUESTION: Who took over your duties at
28 the time you stopped serving as the medical
29 coordinator with the Surgeon General's
30 Advisory Committee on smoking and health?
31 ANSWER: No one. There were two people,
32 Dr. Alex Stavrides, S-T-A-V-R-I-D-E-S, a

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1 pathologist whom we got in about April or
2 May. He was kind of my special assistant,
3 but he was no epidemiologist. And Dr. Eugene
4 Guthrie, who was chief of the division of

5 chronic diseases, who had a large supporting
6 staff, and he was kind of the production
7 manager.

8 QUESTION: Dr. Hamill, at the last
9 session of our deposition -- of your
10 deposition, I believe you stated that the
11 Surgeon General had advised the committee
12 that they would have as much time as they
13 needed to complete their assignments; do you
14 recall that?

15 ANSWER: Yes, sir.

16 QUESTION: Did the Surgeon General's
17 Advisory Committee want more time than they
18 actually received to form this opinion?

19 ANSWER: Certainly at that time, yes.
20 When we found out there was a management --
21 At that time they wanted more time.

22 QUESTION: And were they given more
23 time?

24 ANSWER: No.

25 QUESTION: So the committee's inquiry
26 was to try to learn if there were differences
27 between smokers and nonsmokers that could
28 explain that increased disease risk; is that
29 correct?

30 ANSWER: Exactly. Examine it as
31 carefully as we possibly could.

32 QUESTION: Dr. Hamill, did you continue
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1 to have contacts with the Surgeon General's
2 Advisory Committee after you left the
3 position of medical coordinator because of
4 your health?

5 ANSWER: Yes, sir.

6 QUESTION: What was the nature of that
7 contact?

8 ANSWER: Informal. We would -- Both --
9 Well, quite a few. Call and talk areas over,
10 I would be sent some materials. Some, I
11 would respond to them; some, I wouldn't. I
12 was also, obviously, in the January 7th at
13 the press conference.

14 QUESTION: That was the press conference
15 announcing the Surgeon General's Advisory
16 Committee report?

17 ANSWER: Yes, sir.

18 QUESTION: Were the conclusions of the
19 Surgeon General's Advisory Committee report,
20 to your knowledge, accepted by all members of
21 the committee?

22 ANSWER: Yes, sir.

23 QUESTION: How do you know that?

24 ANSWER: Well, we met for about 45
25 minutes before the press conference in a --
26 in an anteroom of the -- and Dr. Terry went
27 to each person separately and asked him if he
28 was satisfied, was this -- does this reflect
29 your thinking, your decisions, your
30 conclusions. And he asked that of each
31 single man.

32 And he pronounced that at the press

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1 conference, that he had done that; and that,
2 without exception, every man agreed.

3 QUESTION: Dr. Hamill, Chapter 9 is the
4 chapter on cancer and, in particular, lung
5 cancer. Do you know who wrote the final
6 chapter?

7 ANSWER: No, because -- I don't know
8 because the -- almost every draft would be a
9 draft. And it went through interminable
10 revisions and sometimes almost unrecognizable
11 from the, you know, from the beginning to the
12 end.

13 I would say it would not be really
14 accurate to anybody wrote "Cancer."

15 QUESTION: Dr. Hamill, on Page Roman
16 numeral IX, "The committee acknowledges with
17 gratitude of deep appreciation the
18 substantial cooperation and assistance of a
19 number of people."

20 And I would like to ask you about some
21 of the people mentioned here. Tell me if you
22 are familiar with them.

23 Dr. Harold B. Andervont?

24 ANSWER: Referred to him earlier. He
25 was the -- He and Stewart -- He was the
26 editor of the journal Cancer, I guess, from
27 its inception and enormously valuable. A
28 good man.

29 QUESTION: Valuable to the committee?

30 ANSWER: Yes. And to me personally.

31 QUESTION: And did you have and did the
32 committee have a view as to his reputation?

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1 ANSWER: Yes.

2 QUESTION: What was that?

3 ANSWER: Dealing with animal
4 experimentation and animal assays, Andervont
5 was without peer.

6 QUESTION: Joseph Berkson. Who was
7 Joseph Berkson?

8 ANSWER: Chairman of epidemiology at
9 Mayo Clinic.

10 QUESTION: Dr. Hamill, did you have a
11 view as to his reputation?

12 ANSWER: Yes, sir.

13 QUESTION: Did the committee have a
14 view, to your knowledge, as to his
15 reputation?

16 ANSWER: Yes, sir.

17 QUESTION: And what were the views of
18 you and the committee?

19 ANSWER: He was very cantankerous, very
20 bright. He had done some extremely valuable
21 original work on bias in sampling, hospital
22 -- you know, hospital sampling. It was
23 revolutionary for that day and age.

24 Poor Len Schuman was from the same
25 nearby town and he used to get called by Dr.

26 Berkson very frequently.
27 QUESTION: Did you act as liaison for
28 the Surgeon General's Advisory Committee with
29 outside groups --
30 ANSWER: Yes.
31 QUESTION: -- and individuals?
32 ANSWER: Yes.

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1 QUESTION: And did you have that liaison
2 responsibility for The Tobacco Institute
3 Research Committee?

4 ANSWER: Yes, sir.

5 QUESTION: And tell us what that -- the
6 Tobacco Industry Research Committee was?

7 ANSWER: It was headed by a very senior
8 scientist named Clarence Cook Little. And
9 they were quite helpful when we were getting
10 started and opening up their scientific
11 library to us.

12 They had been in business for six, seven
13 years and provided us with reprints on
14 request. Quite a bit of contact with both
15 Dr. Little and Dr. Hockett, who was his
16 deputy, both formal and informal.

17 QUESTION: And they provided you with a
18 lot of information in addition to just acting
19 as a resource; is that correct, sir?

20 ANSWER: How do you mean?

21 QUESTION: Well, you indicated they had
22 a library and you used their library?

23 ANSWER: Scientific research.

24 QUESTION: But they provided you with
25 their own position on certain subjects?

26 ANSWER: Oh, at times we requested that.

27 QUESTION: Why did you, on behalf of the
28 committee, ask for that?

29 ANSWER: Because the committee wanted to
30 know and how to react to it. We were
31 examining all positions, all responsible
32 positions, put it that way.

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1 QUESTION: The Tobacco Industry Research
2 Committee was invited by the Surgeon General
3 to submit a list of the proposed members of
4 the committee or proposed consultants?

5 ANSWER: You mean in the initial
6 selection?

7 QUESTION: Yes.

8 ANSWER: Yes. They were one of the --
9 They were one of the major groups consulted,
10 yes.

11 QUESTION: And the Tobacco Industry
12 Research Committee had the right to object to
13 any member on the committee as being biased
14 in some way; is that correct?

15 ANSWER: Yes. They had the right,
16 pro forma.

17 QUESTION: To your knowledge, did The
18 Tobacco Industry Research Committee or any of

19 its members, funding members, object to any
20 of the members of the Surgeon General's
21 Advisory Committee as being biased?

22 ANSWER: No.

23 QUESTION: Tell us what your
24 understanding was of the effect -- of the
25 effort the Surgeon General made to ensure
26 that the members of the advisory committee
27 were not biased.

28 ANSWER: I had invited the major -- It
29 was the National Tuberculosis Association,
30 Heart Association, Public Health Association,
31 TIRC. There were five started off with about
32 200 recommendations. And they were -- names
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1 were circulated through these groups and
2 through the U.S. Public Health Service,
3 senior staff of the U.S. Public Health
4 Service.

5 And looking both for bias, if someone --
6 for example, Lillienfield testified it was
7 absolutely outstanding but he already
8 published three or four times on smoking and
9 lung cancer. He was automatically excluded
10 from being a member of the committee.

11 He is the best single example, but I
12 stuck him under -- And the quality was
13 probably as important as bias, as bias can be
14 ascertained -- as well as can be ascertained.
15 And we went through -- I started -- I came
16 aboard right at that time.

17 I started -- took those names, started
18 calling people all over the country. And
19 they would give us a name, call somebody
20 else. I made hundreds of calls on both
21 competent and bias and, also, sometimes how
22 would you like to see them sit on the
23 committee.

24 (Whereupon the readback of the above-
25 referenced testimony is paused at this time.)

26 MR. RUSS HERMAN:

27 May I approach, Your Honor?

28 THE COURT:

29 You may approach.

30 (Whereupon a bench conference is held at
31 this time as follows:)

32 MR. RUSS HERMAN:

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1 This is the second time this testimony
2 is being given. It's absolutely repetitive
3 of the first ten minutes of the first section
4 of testimony given.

5 MR. WITTMANN:

6 Well, no objection was made to it, Your
7 Honor. I don't think it is repetitive
8 completely. I think it covers some different
9 areas.

10 THE COURT:

11 Well, if that deposition has been ruled

12 on by me and the objections have been ruled
13 on, it's not appropriate to make them at this
14 point.

15 So if that's an objection, it's
16 overruled.

17 MR. RUSS HERMAN:

18 I understand.

19 (Whereupon the bench conference is
20 concluded at this time.)

21 MR. RUSS HERMAN:

22 Thank you, Judge.

23 MR. WITTMANN:

24 I lost my place in the book, so I'm
25 going to start with another question.

26 MR. RUSS HERMAN:

27 Could we have just a brief recess?

28 Just one moment. I need to ask Mr.

29 Leger something.

30 (Whereupon a discussion was held off
31 the record.)

32 MR. RUSS HERMAN:

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1 Thank you.

2 MR. WITTMANN:

3 Let's start in the middle of Page 93.

4 (Whereupon the above-referenced
5 testimony is read back at this time as
6 follows:)

7 QUESTION: Was there an attempt to avoid
8 having as a member of the Surgeon General's
9 Advisory Committee people who had done
10 research and published on the subject of
11 cigarette smoking and health previously?

12 ANSWER: Not per se. If they had
13 published and had a firm conclusion, yes.
14 But not, you know, not if they worked in
15 there and their conclusion was "I got to do a
16 lot more work."

17 QUESTION: So is it fair to say that the
18 Surgeon General was looking for people who
19 were qualified but who had not taken a formal
20 position on --

21 ANSWER: Precisely.

22 QUESTION: -- on the subject of
23 cigarette smoking and health?

24 ANSWER: Precisely.

25 QUESTION: Were any of the people who
26 were suggested to be members of the Surgeon
27 General's Advisory Committee by the Tobacco
28 Industry Research Committee members of the --

29 ANSWER: You mean subsequently?

30 QUESTION: Subsequently become members
31 of the committee?

32 ANSWER: Let's see. A couple were asked
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1 and wouldn't do it.

2 QUESTION: Why don't you tell us who was
3 asked, sir?

4 ANSWER: Phillipe Shubik, Irvin Page

5 from Cleveland Clinic. I think Averill
6 Liebow was asked. If he wasn't, he was very
7 heavily involved with all of it. Louie
8 Fieser was, in fact, on the committee. He is
9 here. And he was on the full committee,
10 full-time.

11 QUESTION: Dr. Fieser was on the actual
12 advisory committee to the Surgeon General; is
13 that correct?

14 ANSWER: Yes, sir. Kaplan was very
15 strongly wooed and asked. He just couldn't
16 do it. That would be that.

17 QUESTION: So there was a serious
18 attempt by the Surgeon General to enlist a
19 number of the individuals suggested by The
20 Tobacco Industry Research Committee to be
21 members of the advisory committee; is that
22 correct?

23 ANSWER: Oh, yes. Good recommendation.
24 Detlov Bronk, I talked to him. He also -- He
25 was a director of the Rockefeller Institute.
26 And he just couldn't -- he just couldn't get
27 involved.

28 Quite a few of these guys we worked with
29 later on.

30 QUESTION: That was my next question,
31 sir.

32 In addition to Dr. Fieser, who became an
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1 actual member of the Surgeon General's
2 Advisory Committee, did the Surgeon General's
3 Advisory Committee consult in any fashion
4 with other individuals listed on the
5 suggested list of scientists provided by
6 Clarence Cook Little?

7 ANSWER: Yes.

8 Phillipe Shubik was probably one of the
9 most important -- almost a week long meeting
10 in cancer and he chaired the meeting. So he
11 was extremely important.

12 Liebow was in -- was another
13 pathologist, he was very heavily involved in
14 this and then some of the categories we
15 didn't do. Like surgery, social behavioral
16 sciences, we didn't do anything with those.
17 We were going to and then decided not to.

18 QUESTION: Was that a document that was
19 considered by the committee?

20 ANSWER: Oh, everybody read it, sure.

21 Frankly, we learned almost all of our --
22 not from academic people but learned almost
23 all of our stuff about the composition of
24 cigarette smoke, the nature of smoke, physics
25 of smoke, why people smoke from various
26 aspects of the industry.

27 QUESTION: When you say "the industry,"
28 you're talking about the tobacco industry,
29 cigarette industry?

30 ANSWER: Yes. Really quite helpful and,
31 also, knew more than anybody.

32 QUESTION: So the committee relied very

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1 heavily on the information provided by them;
2 is that correct?

3 ANSWER: Yes.

4 I think part of the description of the
5 parallels of the cigarette is taken almost
6 verbatim from one of the pieces.

7 QUESTION: What was your understanding
8 at the time as to why The Tobacco Industry
9 Research Committee was participating with the
10 Surgeon General's Advisory Committee?

11 ANSWER: Even from the very beginning?

12 QUESTION: Yes, sir.

13 ANSWER: My understanding was that we
14 were -- we, the Surgeon General, were trying
15 to, you know, cover all responsible --
16 responsible for all responsible parties. And
17 this was a given. It was already in place
18 when I came on board.

19 QUESTION: You mean the relationship
20 between the advisory committee and The
21 Tobacco Industry Research Committee?

22 ANSWER: Yes -- No, between the tobacco
23 industry and the Surgeon General was already
24 a given.

25 QUESTION: Okay.

26 ANSWER: Anything else would be
27 speculation.

28 QUESTION: I don't want you to
29 speculate. But if you had an understanding
30 at the time, whether it was a correct
31 understanding at the time or an incorrect
32 understanding, I want to know what your

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1 understanding was at the time.

2 ANSWER: I was told by one of my most
3 reliable friends, colleagues, that Clarence
4 Cook Little was a very good scientist and an
5 honorable man. That made a lot of
6 difference. I was told that.

7 QUESTION: When you say it made a lot of
8 difference, in what respect did it make a lot
9 of difference?

10 ANSWER: I would have been a little more
11 cautious as a young officer in public health,
12 wanting to be the Surgeon General. Good God,
13 I am more cautious than I was there.

14 QUESTION: In other words, but for this
15 information about Dr. Little, you might have
16 been more cautious in terms of your dealings
17 with him?

18 ANSWER: Until I met him. As soon as I
19 met him, he was -- he was about as warm and
20 disarming and just -- he was just a super
21 guy.

22 QUESTION: Charming man?

23 ANSWER: Absolutely extraordinary.

24 QUESTION: George Allen?

25 ANSWER: George Allen, the Tobacco

26 Institute or something like that. He got
27 us -- He provided us with very valuable and
28 useful -- Because he just couldn't pull
29 together history on -- information on the
30 history of cigarette smoking -- I don't
31 mean -- I mean practice, when it was done,
32 the dates.

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1 It was quite an exciting document and a
2 little more on cigarette smoking machines
3 than TIRC. Which is understandable because
4 TIRC is really not chemists. They are not
5 working in the biological world. It was more
6 effects of chemistry itself.

7 Allen was able to get us a great deal
8 more information on combustion of cigarette,
9 with the factors that alter combustion and
10 the kind of the state-of-the-art cigarette
11 smoking machines.

12 QUESTION: Did the committee rely upon
13 the information supplied by Mr. Allen to them
14 concerning the history of the use of
15 cigarettes and other information pertinent to
16 smoking machines?

17 ANSWER: Well, like everything else, we
18 double-checked -- or, preferably,
19 double-checked on everything. And somebody
20 in one of our liaison committees was in the
21 Food and Drug -- either Food and Drug or one
22 of those things who had sources that he -- he
23 had most of the information checked out, that
24 it was quite reliable.

25 But this is also an area that is not
26 particularly controversial, wasn't central to
27 making decisions on the health hazards of
28 smoking.

29 QUESTION: Let me show you a document
30 which has been marked as "Hamill 50" for
31 identification. Can you tell us what it is?

32 ANSWER: This is from Dr. Little to me,
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1 February 11th, 1963.

2 QUESTION: Was there an ongoing process
3 by which he would continually furnish you and
4 the committee with information concerning the
5 cigarette smoking and health issue?

6 ANSWER: Yes.

7 QUESTION: Would these be unsolicited in
8 certain instances?

9 ANSWER: I invited him to.

10 QUESTION: Whatever additional
11 information he wanted to submit, you told him
12 to please submit?

13 ANSWER: Yes.

14 Some of the stuff, I would screen and
15 set aside, might have come back up. Some of
16 the stuff was extremely useful. It was all
17 handled in different ways. But I invited
18 him, with the encouragement of either Dr.

19 Hundley or Dr. Terry, with encouragement, to
20 invite them to send --
21 QUESTION: Dr. Terry, the Surgeon
22 General of the United States?
23 ANSWER: Yes.
24 -- to send whatever he felt might be
25 helpful.
26 QUESTION: And would you pass on this
27 information to the members of the committee?
28 ANSWER: In most cases, yes. Some
29 cases, I might have thought it was a little
30 extraneous and might have sat on it. That
31 was one of my functions.
32 QUESTION: There was information that
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1 was supplied, was there not, from the TIRC
2 and tobacco companies which was considered
3 confidential by the companies [sic]; is that
4 correct?
5 ANSWER: If it were, I think it would
6 have been something from Allen.
7 QUESTION: From George Allen?
8 ANSWER: George Allen, I think.
9 QUESTION: Did the committee ever
10 express its concern that they did not have
11 sufficient time to do an adequate job?
12 ANSWER: Yes.
13 QUESTION: To whom?
14 ANSWER: To the Surgeon General, to Dr.
15 Hundley and to me when it was announced that
16 we had to be finished by the end of the year.
17 QUESTION: The Surgeon General's
18 Advisory Committee did not do original
19 research; did they, sir?
20 ANSWER: No. Conduct -- They did not
21 conduct original research.
22 (Whereupon the readback of the above-
23 referenced testimony is concluded at this
24 time.)
25 MR. WITTMANN:
26 Your Honor, I believe that does conclude
27 the testimony of Dr. Hamill.
28 And I see that Dr. Gio Gori has now
29 arrived in the courtroom.
30 THE COURT:
31 We're going to take our 15-minute recess
32 between the two and we'll recess until 25
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1 minutes after 2:00 by the wall clock.
2 (Whereupon the jury is excused at this
3 time.)
4 THE COURT:
5 Let the record reflect the jury has left
6 the courtroom.
7 Anything for the record by plaintiffs'
8 counsel?
9 MR. RUSS HERMAN:
10 Yes, Your Honor.
11 Counterdesignations in this case were

12 made by a member of the trial team, Jack
13 Maistros, who died in an automobile wreck.
14 That certainly doesn't excuse the failure to
15 object to repetition. And any further
16 designations where Mr. Maistros may appear,
17 I'll review those personally in advance and I
18 will file written objections, if I need to.
19 That's all I have.
20 THE COURT:
21 Anything by defense counsel?
22 MR. SCHNEIDER:
23 Yes, Your Honor.
24 If I could put on the record my response
25 to Mr. Bruno's tender of various documents
26 yesterday.
27 THE COURT:
28 Just let me get them before me.
29 MR. RUSS HERMAN:
30 Excuse me a second, Your Honor. Joe.
31 MR. BRUNO:
32 Yes.

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1 MR. RUSS HERMAN:
2 We're arguing the exhibits from
3 yesterday.
4 MR. BRUNO:
5 Oh, okay.
6 (Whereupon a discussion was held off the
7 record.)
8 MR. SCHNEIDER:
9 Your Honor, with respect to the
10 documents tendered by Mr. Bruno at the close
11 of Dr. Rowell's testimony yesterday, I'll go
12 through them one by one.
13 First, he tendered a transcript Page
14 11366, which was a clip from the opening
15 statement of the defendants. The opening
16 statement is not evidence. The transcript
17 page should not be admitted into evidence.
18 Next is Document 1882.01, which is a
19 Brown & Williamson website excerpt. I do not
20 object to coming into evidence the portion
21 concerning nicotine and addiction that Mr.
22 Bruno discussed with the jury, the portion of
23 that website, but not the whole document, not
24 all of 1882.01.
25 Next is 1961.01, which is the Brown &
26 Williamson request for admissions. And I'm
27 going to deal with a series of them together.
28 Next is 0806.01 which is Philip Morris'
29 request for admissions.
30 Next is 4741.01, which is the RJR
31 website.
32 Next is 4788.01, which is RJR's request

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1 for admissions.
2 And next is 2871.02, which is
3 Lorillard's request for admissions.
4 None of those documents were

5 specifically identified with Dr. Rowell, none
6 of them were offered into evidence at the
7 time, none of them were mentioned by name or
8 shown to the jury.

9 Mr. Bruno asked a question like -- In
10 fact, you can look at the transcript at Page
11 19239, Mr. Bruno asked a question like: You
12 understand that there are Requests for
13 Admissions and websites that admit that
14 smoking is addictive? And that was it.

15 He didn't tender the particular
16 documents, identify them by name, show them
17 to the jury. They should not be offered into
18 evidence in this case on that basis.

19 The next document was GK-100254, which
20 was an article by Pontieri. Mr. Bruno showed
21 the jury one sentence from that article.
22 That one sentence was shown to the jury.
23 It's admitted as a learned treatise, just
24 that sentence, but the whole document should
25 not come into evidence. He showed the jury
26 the part that he wanted to show, and that's
27 it. It shouldn't be admitted as an exhibit.

28 GK-000487 was an article by Dr.
29 Henningfield. Again, he read one sentence
30 out of that document, one or two sentences.
31 Those two sentences have now been seen by the
32 jury as a learned treatise; but other than

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1 that, the document should not come into
2 evidence or be admitted independently.

3 The next series of documents, Your
4 Honor, I will treat together, if you will.
5 And they are 0913, which is a Mortality and
6 Morbidity Report from 1994; 0972.02, a
7 Mortality and Morbidity Report from 2002;
8 1383.02, which is some CDC data; 1395.02,
9 which is CDC data on adolescent cigarette
10 usage; 1377.02, which is a set of data on
11 incidence of use of cigarettes; 1396.02, a
12 Mortality and Morbidity Report from 1994;
13 1174.01, which is a Mortality and Morbidity
14 Report from 2000; and, lastly, 1398.02, which
15 is a collection of disease rates across the
16 country, including Kentucky.

17 None of these documents were identified
18 by number with Dr. Rowell, none of them were
19 offered to Dr. Rowell to authenticate or
20 identify. Instead, they were listed on
21 plaintiffs' cross exhibit list but they were
22 never used as exhibits during the cross.

23 Mr. Bruno made a reference to: Isn't
24 there CDC data that says that adolescents
25 smoke cigarettes? And the witness said:
26 "Yes." That was it. There was no -- There
27 was a vague reference to information but not
28 these specific documents. They weren't put
29 up on the screen, they weren't tendered, they
30 weren't shown to the witness.

31 This, after all, is the defendants'
32 case. It's not the opportunity for the

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1 plaintiffs to put into evidence documents
2 that weren't even used with the witness.

3 And for those reasons, with respect to
4 those documents, we would object to their
5 admission.

6 MR. WITTMANN:

7 I have one further point to add, Your
8 Honor, with respect to Plaintiffs' Exhibit
9 4741.01, which is the RJR website.

10 Mr. Bruno referred the witness to one
11 section of the website on addiction. The
12 remaining portions of the website were not
13 used or introduced and should not be admitted
14 because they contain a whole host of
15 irrelevant topics, including the Master
16 Settlement Agreement with the State Attorneys
17 General, secondhand smoke issues and other
18 issues that Your Honor has excluded from
19 evidence in this trial.

20 And with respect to RJR's answer to
21 Request for Admission Number 23, I would
22 submit that that response would be
23 appropriate for admission if it passes muster
24 at all; but that the entire set of Requests
25 for Admissions should not come in because
26 they're irrelevant in many cases to the
27 issues at hand.

28 THE COURT:

29 Thank you.

30 Mr. Bruno, are you interested in
31 responding?

32 MR. BRUNO:

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1 Well, just to this extent, Your Honor.
2 I'm happy, with regard to the websites, I'm
3 happy to work with them. To the extent that
4 there may be some objectionable things in
5 there, I'm open to that.

6 With regard to everything else, 402 says
7 all relevant evidence is admissible.

8 THE COURT:

9 I will view the transcript of the offers
10 yesterday and the objections today and I will
11 rule after that.

12 MR. BRUNO:

13 Thank you, Judge.

14 MR. SCHNEIDER:

15 Your Honor, let me add one other thing
16 to the record, if I could.

17 All of those documents that I referenced
18 from 0913 on to 1398, all that, of course,
19 are out-of-court statements, they're hearsay,
20 and that's another reason for their
21 nonadmission.

22 I do agree with Mr. Wittmann that with
23 respect to the Brown & Williamson Requests
24 for Admission, the relevant one is Number 23
25 as well.

26 THE COURT:
27 Anything else for the record by defense
28 counsel?
29 MR. WITTMANN:
30 No, Your Honor.
31 THE COURT:
32 And the deposition that will follow is
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1 of whom?
2 MR. WITTMANN:
3 Dr. Gio Gori.
4 THE COURT:
5 And is there an estimate of the length
6 of time it will take to do that?
7 MR. WITTMANN:
8 A little shorter than this one. I think
9 about 45 minutes.
10 THE COURT:
11 We'll recess until 25 minutes after by
12 the wall clock.
13 MR. LONG:
14 Your Honor, one other thing.
15 On behalf of Lorillard, we make the same
16 objection as to the limited scope of all the
17 Requests for Admissions. Only the one that
18 Mr. Bruno read into evidence, I think, should
19 come in.
20 MR. GAY:
21 Ditto for Philip Morris, Your Honor.
22 (Whereupon a brief recess was taken at
23 this time from 2:18 o'clock p.m. to 2:24
24 o'clock p.m.)
25 THE BAILIFF:
26 All rise for the jurors, please.
27 (Whereupon the jury joins the
28 proceedings at this time.)
29 THE MINUTE CLERK:
30 All rise, please. Recess is over.
31 Court will come to order. Please be seated.
32 THE COURT:

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1 Mr. Wittmann?
2 MR. WITTMANN:
3 Thank you, Your Honor.
4 With the help of my partner, John
5 Landis, Your Honor, we're going to provide
6 the jury with the deposition of Dr. Gio Gori,
7 who is the Director of the National Cancer
8 Institute's Smoking and Health Programs, a
9 part of the National Cancer Institute's
10 Division of Cancer Cause and Prevention from
11 1968 to 1980.
12 Dr. Gori was also in charge of the
13 National Cancer Institute's Tobacco Working
14 Group, a joint task force of government
15 public health scientists and tobacco company
16 scientists who were working together in an
17 attempt to make a safer cigarette. This
18 deposition was taken in, I believe, 1991.

19 MR. LEGER:
20 Yes.
21 Your Honor, we'd just like the record to
22 reflect the deposition was taken in the case
23 of Cipollone versus Liggett Group, in the
24 United States District Court, in the District
25 of New Jersey, March 11th, 1991.
26 The lawyers in this case and the parties
27 in this case were not directly involved; but,
28 nonetheless, by agreement the proceedings
29 will go forward.
30 And additionally, after 1991, at some
31 time not covered by this deposition, Dr. Gori
32 also was a consultant to the tobacco
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1 companies and the tobacco industry
2 organization.
3 THE COURT:
4 Mr. Wittmann.
5 MR. WITTMANN:
6 Thank you, Your Honor.
7 (Whereupon the above-referenced
8 testimony is read back at this time as
9 follows:)
10 QUESTION: Good afternoon, Doctor.
11 ANSWER: Good afternoon.
12 QUESTION: Let's talk about your
13 educational background for awhile, Doctor.
14 Where did you attend undergraduate
15 school?
16 ANSWER: In Italy.
17 QUESTION: What is the name of the
18 school?
19 ANSWER: I will have to spell it out for
20 you. L-I-C-E-O, next word is
21 S-T-E-L-L-I-N-I.
22 QUESTION: And when did you graduate?
23 ANSWER: 1949.
24 QUESTION: What was your degree in?
25 ANSWER: In liberal arts, classical
26 education.
27 QUESTION: And then what did you do?
28 ANSWER: Then I went to university.
29 QUESTION: University of what?
30 ANSWER: First, I was enrolled in the
31 University of Rome.
32 QUESTION: You were enrolled in 1949?
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1 ANSWER: Yes.
2 QUESTION: And what did you study?
3 ANSWER: I studied basic science at that
4 time for a year or so.
5 QUESTION: With a view of receiving a
6 graduate degree in what subject?
7 ANSWER: No, not -- I just had
8 coursework.
9 QUESTION: Were you a full-time student?
10 ANSWER: Yes, the first year, yes.
11 QUESTION: And then what happened?

12 ANSWER: I continued being a full-time
13 student, plus I was working to sustain
14 myself.
15 QUESTION: What did you do?
16 ANSWER: Oh, a number of things from
17 driving cabs to working in restaurants.
18 QUESTION: And how long did you stay at
19 the University of Rome?
20 ANSWER: Two or three years, I believe.
21 QUESTION: 1949 to 19 --
22 ANSWER: '52, '53, something of the
23 sort.
24 QUESTION: You were there two or three
25 years?
26 ANSWER: Right.
27 QUESTION: As a full-time student?
28 ANSWER: Yes.
29 QUESTION: Were you working towards a
30 graduate degree at that time?
31 ANSWER: Yes. I started my career for a
32 doctorate in biological sciences.

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1 QUESTION: And then what happened?
2 ANSWER: Then I transferred to the
3 University of Padua.
4 QUESTION: Spell that, please.
5 ANSWER: P-A-D-U-A.
6 QUESTION: Why?
7 ANSWER: It was close to my home, my
8 hometown, and I had a job there with some
9 relatives of mine as well.
10 QUESTION: How long were you there?
11 ANSWER: I was there a couple of years,
12 I believe.
13 QUESTION: 1955?
14 ANSWER: Probably one year, yes, 1955.
15 Then I moved to the University of Camerino.
16 QUESTION: Why?
17 ANSWER: At that time I had started my
18 thesis work with a professor that was
19 transferred to that university. And I had
20 saved some money and it looked like a good
21 opportunity to move there and finish up my
22 studies.
23 QUESTION: You finished up in 19 --
24 ANSWER: '55, I believe, or '56. I
25 don't remember exactly.
26 QUESTION: Then what did you do?
27 ANSWER: Then I applied for a
28 postdoctorate scholarship at the National
29 Institutes of Health in Rome, and I was
30 accepted. And I started working in the same
31 summer, a couple of months after I graduated
32 at the Instituto -- I will write this as well

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1 -- I-N-S-T-I-T-U-T-O, next word is
2 S-U-P-E-R-I-O-R-E, next word is D-I, the next
3 is S-A-N-I-T-A, Instituto Superiore Di
4 Sanita, which is the equivalent of the

5 National Institute of Health in Italy.
6 QUESTION: So when you said the National
7 Institute of Health, that wasn't the National
8 Institute of Health as we know it in the
9 United States?
10 ANSWER: It serves more or less the same
11 purpose.
12 QUESTION: But it's not affiliated with
13 the NIH here in the States?
14 ANSWER: No. It is the National
15 Institutes of Health of Italy.
16 QUESTION: What did you do there?
17 ANSWER: I worked there as a
18 microbiologist initially on antibiotics and
19 the biology of brine material.
20 QUESTION: How long did you do that?
21 ANSWER: For a year. And then I
22 switched to work on viruses.
23 QUESTION: Viruses?
24 ANSWER: Yes. Poliovirus in particular.
25 QUESTION: How long did you work with
26 respect to the virus research?
27 ANSWER: I worked through the end of
28 1958.
29 QUESTION: And then what did you do?
30 ANSWER: In the summer of '58, Dr. Salk
31 came to the institute to deliver a series of
32 lectures. And I got to know him at the time,
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1 and he offered me a job at the University of
2 Pittsburgh with him to work on polio vaccines
3 and related matters. And I accepted his
4 offer and came to this country in 1959
5 working here.
6 QUESTION: And then what did you do?
7 ANSWER: Then I went back to Italy and I
8 worked for an industrial complex producing
9 the polio vaccine.
10 QUESTION: A pharmaceutical company?
11 ANSWER: Yes.
12 QUESTION: What was the name of the
13 company?
14 ANSWER: Sclavo.
15 QUESTION: Spell it, please.
16 ANSWER: S-C-L-A-V-O.
17 QUESTION: Is it still in existence?
18 ANSWER: They might have been bought by
19 some bigger outfit at this point here.
20 Probably they are not as they used to be.
21 QUESTION: Where is that located?
22 ANSWER: Siena.
23 QUESTION: How long did you work for
24 them?
25 ANSWER: One year.
26 QUESTION: And then what did you do?
27 ANSWER: Then in the summer of 1960,
28 Professor Koprowski from the Wistar Institute
29 in Philadelphia visited laboratories and the
30 story repeated itself. He offered me a job
31 at the University of Pennsylvania, and I
32 accepted his offer and came to Philadelphia

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1 at the end of 1960.

2 QUESTION: To do what?

3 ANSWER: To work on what I thought at
4 the time to be anticancer viruses, namely,
5 viruses that might target specifically cancer
6 cells.

7 QUESTION: How long did you do that?

8 ANSWER: Up to 1962, I believe.

9 QUESTION: And then what did you do?

10 ANSWER: I had an offer to join a
11 commercial firm in Bethesda, Microbiologic
12 Associates, and I accepted that offer and
13 transferred down there to Bethesda.

14 QUESTION: What did you do there?

15 ANSWER: I was initially, for a brief
16 period of time, simply an assistant to the
17 president of the company, trying to plan the
18 future of the company. And then I became
19 Director of Production and Director of
20 Quality Control at Microbiology Associates.

21 QUESTION: What did they do?

22 ANSWER: The company was producing a
23 large number of products to be utilized in
24 cancer research, virus research,
25 immunotherapy and so on. And I was
26 supervising the production and the quality
27 control of the output of the company.

28 QUESTION: And you were there until
29 1965?

30 ANSWER: '65, yes.

31 QUESTION: Now we are getting into your
32 resume' here. In 1965, you left and went with

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1 Melpar?

2 ANSWER: Yes.

3 QUESTION: What was that?

4 ANSWER: Melpar was a subsidiary of
5 Westinghouse Corporation at that time doing
6 contract work for the National Institutes of
7 Health, for the Army, and for a variety of
8 other contractors.

9 QUESTION: What type of work were they
10 doing?

11 ANSWER: They were engaged in all sorts
12 of things from electronics to engineering to
13 mechanical work and, also, they had a
14 biological section.

15 QUESTION: You were involved with
16 viruses and immunology and toxicology?

17 ANSWER: That's correct.

18 QUESTION: From 1967?

19 ANSWER: Yes.

20 QUESTION: And then you went to the
21 biological research laboratory at Litton
22 Systems?

23 ANSWER: Correct.

24 QUESTION: What did you do there?

25 ANSWER: More or less the same things.

26 QUESTION: That brings us up to 1968?
27 ANSWER: Yes.
28 QUESTION: What happened then?
29 ANSWER: During my tenure at Melpar and
30 at Litton, I had done work under contract for
31 the National Cancer Institute and got to know
32 some people at the National Cancer Institute,
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1 specifically a Dr. Carl Baker, who was at
2 that time Director of the Etiology Division,
3 namely, the division that deals with the
4 causes of cancer. And he asked me whether I
5 would join him in the division. And after a
6 few months of talks and discussion,
7 eventually I joined the National Cancer
8 Institute in 1968.

9 QUESTION: Who were the outside
10 consultants?

11 ANSWER: Oh, people like Dr. Wynder, Dr.
12 Shubik, Dr. Norton Nelson, Dr. Henry Pitot
13 from McArdle Laboratories, Ross Boutwell, a
14 number of people.

15 QUESTION: Well, I guess what I'm trying
16 to find out, were you more on an
17 administrative basis than a scientific basis?

18 ANSWER: No, I didn't have any
19 administrative responsibilities, no.

20 QUESTION: How long did that remain the
21 structure within which you worked?

22 ANSWER: You mean my position within the
23 structure?

24 QUESTION: Yes.

25 ANSWER: I believe up to 1972.

26 QUESTION: What happened then?

27 ANSWER: I was promoted to deputy
28 director of the division.

29 QUESTION: And how did that change your
30 responsibilities?

31 ANSWER: Well, I became -- Actually, at
32 that time that was a newly created position

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1 because as a result of the National Cancer
2 Act, the budgets and the scope of the
3 operation had increased that much. So,
4 essentially, I was functioning in tandem, if
5 you wish, with the director sharing
6 responsibility with him.

7 QUESTION: Tell me then what else did
8 you do other than plan?

9 ANSWER: By that time, I was really
10 supervising, if you wish, the conduct of
11 research throughout the division. And, as
12 you know, most of the jobs at this level are
13 done through meetings. And, therefore, I was
14 participating with technical and scientific
15 meetings, with people within the division, or
16 representing the division at a higher level
17 within the institute, or with other
18 organizations throughout the government.

19 QUESTION: And did this continue until
20 you left in 1980?

21 ANSWER: Yes. That was my official
22 position.

23 QUESTION: And you list Director of
24 Smoking and Health Programs, 1968 to 1980?

25 ANSWER: Yes.

26 QUESTION: Is that within this
27 organizational structure somewhere?

28 ANSWER: It certainly was within the
29 Division of Cancer Cause and Prevention, but
30 it was a program that did not belong to the
31 three main activities or sections of the
32 division.

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1 QUESTION: So that --

2 ANSWER: It was an independent program.

3 QUESTION: You had epidemiology,
4 carcinogenesis and tumor virology?

5 ANSWER: Yes.

6 QUESTION: And then you had a separate
7 branch, Smoking and Health Program?

8 ANSWER: Yes.

9 QUESTION: And you were in charge of
10 that?

11 ANSWER: That's right.

12 QUESTION: And that was created in 1968?

13 ANSWER: It started in 1968, yes.

14 QUESTION: Was it a formal part of this
15 overall department?

16 ANSWER: Yes.

17 QUESTION: And what were your
18 responsibilities with respect to the Smoking
19 and Health Program beginning in 1968?

20 ANSWER: My initial responsibilities
21 were to run the Tobacco Working Group, so to
22 speak. That had been formed to advise the
23 activities of the Smoking and Health Program.

24 QUESTION: Okay. Was it your idea to
25 form the Tobacco Working Group?

26 ANSWER: It was already formed when I
27 joined the institute.

28 QUESTION: Who had been working on that
29 at the institute prior to your getting there?

30 ANSWER: Dr. Carl Baker, the director of
31 the division.

32 QUESTION: For what period of time had

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1 it been working?

2 ANSWER: I believe it had started just
3 in the mid 1980 -- I mean, '78, '68, I'm
4 sorry, mid '68. So it was just formed when I
5 joined them.

6 QUESTION: So you would act as liaison
7 between the division and industry?

8 ANSWER: No. I was simply making sure
9 that the Tobacco Working Group was convening
10 and was providing the advice that was
11 necessary for the information of the Smoking

12 and Health Program.
13 QUESTION: What original research did
14 you do while you were with the National
15 Cancer Institute that related specifically to
16 cigarette smoking and health?
17 ANSWER: I directed most of the program
18 that the National Cancer Institute developed.
19 QUESTION: When you say you directed the
20 program, what do you mean?
21 ANSWER: I directed the planning, the
22 execution, publication of the data and the
23 interpretation of data and so on.
24 QUESTION: Were you the scientific
25 investigator on these research programs?
26 ANSWER: If you mean did I paint the
27 mice and looked over them, no, that was not
28 the function I had.
29 QUESTION: But you were the one that
30 designed the research program, the research
31 projects, you were the one that designed all
32 of them?

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1 ANSWER: Correct. With the help of the
2 Tobacco Working Group and concurrence of the
3 Tobacco Working Group and other scientists,
4 of course.
5 QUESTION: And did you publish papers
6 out of that work that you did?
7 ANSWER: From time to time, yes.
8 QUESTION: Doctor, you were the director
9 of the Smoking and Health Program through
10 1980 when you left?
11 ANSWER: Yes.
12 QUESTION: Were you relieved of any
13 responsibilities as Director of Smoking and
14 Health at any point in time prior to your
15 leaving in 1980?
16 ANSWER: No.
17 QUESTION: Did your responsibilities
18 change in any way in or about 1979?
19 ANSWER: No.
20 QUESTION: So you did the same thing in
21 1978 as you did in 1980 at the National
22 Cancer Institute?
23 ANSWER: More or less, except that the
24 budget of the smoking lab program or the
25 nutrition program, of which I also was
26 director, was significantly curtailed.
27 QUESTION: Why did you leave?
28 ANSWER: Essentially, because the two
29 programs that I was directing personally,
30 namely, the Smoking and Health Program and
31 the Diet, Nutrition and Cancer Program, the
32 funds for these programs were severely

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1 curtailed. And I didn't think I would have
2 as much fun continuing in these positions.
3 QUESTION: When you say "much fun," what
4 do you mean? I know you meant that sort of

5 in jest.

6 ANSWER: I would not be able to pursue
7 my scientific interests in that area.

8 QUESTION: You didn't leave because you
9 felt that you were being pressured within the
10 National Cancer Institute because of
11 statements that you made regarding cigarette
12 smoking and health?

13 ANSWER: That might have contributed to
14 my decision, although I was not particularly
15 pressured. But, certainly, the curtailment
16 of funds and the change of policy was a
17 contributing factor.

18 QUESTION: And what pressure did you
19 receive as a result of certain statements
20 that you made regarding cigarette smoking and
21 health?

22 ANSWER: The Smoking and Health Program
23 of the National Cancer Institute was started
24 under a policy of the Department of Health,
25 that the goal of the National Cancer
26 Institute was to define research towards
27 producing less hazardous cigarettes.

28 And I had developed a program and worked
29 in the program on that policy up to 1977
30 when, suddenly, the policy of the Department
31 of Health changed to a policy that canceled
32 the program for developing less hazardous

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1 cigarettes and focused exclusively on ways to
2 have people stop smoking.

3 Under the circumstances, I think it is
4 understandable that the funds were curtailed
5 and my opportunities to do research in this
6 area were also substantially curtailed.

7 QUESTION: And, again, you understand
8 that's an assumption?

9 ANSWER: I understand it is an
10 assumption that assumes that smoking causes
11 lung cancer.

12 QUESTION: That's correct.

13 ANSWER: Based on elementary
14 toxicological principles, a cigarette that
15 would deliver a lower dose of smoke would
16 have to be less hazardous.

17 QUESTION: And when you say "a lower
18 dose of smoke," what are you talking about?

19 ANSWER: Simply that, a lower dose of
20 smoke.

21 QUESTION: Well, are we looking at tars
22 or are we looking at nicotine or are we
23 looking at both?

24 ANSWER: We're looking at smoke.

25 QUESTION: We're just looking at the
26 amount of smoke people bring into their
27 lungs?

28 ANSWER: Correct.

29 QUESTION: Let's talk about your opinions
30 with respect to the relative hazards of
31 smoking cigarettes based upon the amount of
32 tar and nicotine in the cigarettes, again in

1 the context of the assumption that cigarette
2 smoking does cause lung cancer in human
3 beings.

4 So people regulate their intake of tar
5 and nicotine; is that what we get out of
6 that?

7 ANSWER: Everybody has his own level of
8 contentment.

9 QUESTION: Is that what you're saying,
10 though, Doctor?

11 ANSWER: Yes.

12 QUESTION: Regardless of what it says on
13 a cigarette, we self-regulate the amount of
14 tar and nicotine we draw into our lungs?

15 ANSWER: Every individual has that
16 capacity, apparently, yes.

17 QUESTION: I know they have the capacity
18 to do it, but is that what we do when we
19 smoke?

20 ANSWER: Provided that we understand
21 that what an individual regulates at Moment A
22 may not be the same as what he regulates at
23 Moment B.

24 QUESTION: Or C or D or E?

25 ANSWER: That's correct.

26 QUESTION: It seems to me that you have
27 told me regardless of whether you gave
28 somebody a high tar and nicotine cigarette or
29 you gave them a low tar and nicotine
30 cigarette, they are going to adjust through
31 their inhalation or use of the cigarette how
32 much tar and nicotine they get into their

1 body?

2 ANSWER: Yes.

3 QUESTION: And will they do that at
4 Point A and Point B and Point C, insofar as
5 your studies are concerned?

6 ANSWER: Yes, they would have different
7 levels of adjustment depending upon their
8 moment in the day.

9 QUESTION: Did you make any
10 determination to see whether or not people
11 are consciously aware of the control of the
12 nicotine and tar intake that they make?

13 ANSWER: No, we have not made a
14 determination.

15 QUESTION: Did you formulate any
16 opinions in that regard, whether people do
17 this on a conscious level or a subconscious
18 level?

19 ANSWER: My opinion is -- It is based on
20 a guess at this point here or, if you wish,
21 on unscientific observations. And I would
22 say that the answer to that is it is a mix.
23 Sometimes they would do it consciously and
24 sometimes they would do it without thinking
25 about it.

26 QUESTION: Could you produce a cigarette
27 in the 1970s that produced one milligram of
28 tar and one milligram of nicotine?
29 ANSWER: Experimentally, yes.
30 QUESTION: But you say it couldn't have
31 been sold?
32 ANSWER: That's correct.

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1 QUESTION: Why is that?
2 ANSWER: Most likely because it didn't
3 taste like much.
4 QUESTION: Do you know whether any of
5 the tobacco companies were working on
6 marketing such a cigarette in the 1970s?
7 ANSWER: Not in the '70s that I recall.
8 QUESTION: Did you have discussions with
9 them in the context of the Tobacco Working
10 Group in that regard?
11 ANSWER: Not about brands or any product
12 that they marketed directly, no.
13 QUESTION: How did you determine that
14 they had been working on this for some period
15 of time and, therefore, it wasn't feasible?
16 ANSWER: I don't recall any cigarette
17 that yields those levels in the '70s, being
18 marketed in the '70s.
19 QUESTION: I'm not saying that it was
20 marketed, Doctor, but that the technology was
21 available to the tobacco industry in the '70s
22 to market the product, if they wanted to?
23 ANSWER: I don't think that the
24 technology was available in the '70s.
25 QUESTION: You had some contact with Dr.
26 Mold regarding the Palladium cigarette?
27 ANSWER: I remember the name and I might
28 have met Dr. Mold in regard to that
29 cigarette.
30 QUESTION: What do you remember about
31 him?
32 ANSWER: About Dr. Mold?

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1 QUESTION: Yes.
2 ANSWER: I remember only his name.
3 QUESTION: Are you familiar with the
4 Palladium cigarette?
5 ANSWER: I remember that it was
6 suggested to me as a possible entry in the
7 experimental cigarettes that the Tobacco
8 Working Group and the Smoking and Health
9 Program were considering.
10 QUESTION: And did you consider it?
11 ANSWER: I remember we had discussions
12 about it, yes.
13 QUESTION: And what was the discussion?
14 ANSWER: I don't recall because this was
15 in the early '70s, so it is way back.
16 Essentially, if I recall the substance or the
17 gist of the discussion, a proposal was made
18 that we might wish to consider including an

19 experimental cigarette with palladium and
20 magnesium nitrate as a possible means of
21 reducing the carcinogenicity of the tar --
22 in the tar of the cigarette.

23 QUESTION: Did you consider that as part
24 of the program?

25 ANSWER: We certainly talked about it a
26 variety of ways, including meetings of the
27 Tobacco Working Group, I believe, but the
28 final decision was not attested.

29 QUESTION: Why?

30 ANSWER: There were probably several
31 considerations at that time. One was
32 referring to the use of nitrates in general.

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1 At that time, the issue of nitrosamines in
2 smoke was quite fashionable, and it was known
3 that increasing nitrate could increase the
4 levels of nitrosamines.

5 Second, there were reports in the
6 literature about the potential
7 carcinogenicity of palladium salts in
8 animals, which entered into the
9 consideration.

10 And, third, I believe there was a
11 general reluctance to study substances that
12 could be used competitively by any particular
13 industry. But the health considerations, I
14 believe, were the major considerations
15 against testing the palladium cigarette.

16 QUESTION: Do you want to talk about the
17 significance of the results of the Tobacco
18 Working Group research?

19 ANSWER: The results of the
20 skin-painting experiments, by and large, were
21 not very productive in the sense that the
22 specific carcinogenic activity of the
23 condensates from those cigarettes, the
24 experimental cigarettes, on the mouse skin
25 was not dramatically different from cigarette
26 to cigarette.

27 What the program developed were methods
28 that would allow a lower emission of smoke
29 from cigarettes. Unfortunately, this results
30 in low acceptability of the cigarettes; and,
31 therefore, the program also engaged in
32 exploring how eventually the cigarettes could

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1 be made more palatable without reaching a
2 conclusion because these studies were
3 undertaken towards the end of the 1970s when
4 the program was curtailed and closed up
5 essentially in this direction.

6 The inhalation studies, as I said, by
7 and large, were interrupted before they could
8 be completed except for the inhalation
9 studies in dogs, one set of experiments done
10 with joint funding from the National Cancer
11 Institute and the National Heart and Lung

12 Institute and supervised by scientists in
13 both institutes.
14 The study, the inhalation study in dogs,
15 was studying the effect of smoking, per se,
16 nicotine and carbon monoxide on the
17 development of arterial sclerosis in dogs,
18 along with the added variable of diets high
19 in cholesterol. Groups of dogs were fed
20 diets with five percent cholesterol, I
21 believe, in that diet.
22 That study was completed and a report
23 was made, although the reports of the study
24 have not been published.
25 QUESTION: The report was made to whom?
26 ANSWER: The report was made by the
27 contractor that performed the study, Hazleton
28 Laboratories, and it was made to the NCI and
29 to the National Heart and Lung Institute.
30 QUESTION: Why wasn't it published?
31 ANSWER: I don't know.
32 QUESTION: You don't have any idea?

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1 ANSWER: I presume benign neglect.
2 QUESTION: And why was the program
3 administratively terminated?
4 ANSWER: Again, because of the change of
5 policy, if you wish, that switched it from
6 endorsing a program to develop a less
7 hazardous cigarette to a program that was
8 exclusively focused on persuading smokers to
9 stop smoking.
10 QUESTION: And precisely when did that
11 occur?
12 ANSWER: 1977, '78, with the advent of
13 Secretary Califano.
14 QUESTION: Is there anything else you
15 want to tell us about your work with the
16 Tobacco Working Group and the cooperation
17 that you received from the industry?
18 ANSWER: It was clear to the National
19 Cancer Institute Director and the Director of
20 the Etiology Department before I got there in
21 1968, when they started forming the Tobacco
22 Working Group, that the technology for the
23 modification of cigarettes was available only
24 to the tobacco industry.
25 This is not a technology that is taught
26 in universities like food technology or
27 something of the sort. And it was clear that
28 if a program had to be mounted regarding the
29 modification of cigarettes, the contribution
30 of experts in this field would be necessary.
31 And, therefore, the Cancer Institute
32 invited experts, which happened to be the

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1 directors of research of the tobacco
2 industries at that time, to be part of the
3 Tobacco Working Group, along with a number of
4 other scientists, epidemiologists,

5 biochemists, experts in carcinogenesis,
6 statisticians, physicians, whatnot, from both
7 the federal government and academic
8 institutions.

9 QUESTION: Is that the extent that
10 you're going to testify with respect to the
11 cooperation of the industry?

12 ANSWER: The industry helped defining
13 the physical experimental variables of
14 cigarettes. And after there was an agreement
15 on these variables, they also made free of
16 charge all of these experimental cigarettes,
17 several hundred millions of them altogether.

18 And they have been essential, therefore,
19 in the experimental conduct of this
20 particular study. And, in my experience,
21 they have been very cooperative in these
22 efforts.

23 QUESTION: Anything else you want to
24 tell us about the cooperation of the
25 industry?

26 ANSWER: That's about the extent in
27 which they helped and cooperated within the
28 Tobacco Working Group.

29 QUESTION: Thank you very much, Doctor.
30 (Whereupon the readback of the above-
31 referenced testimony is concluded at this
32 time.)

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1 MR. WITTMANN:
2 Your Honor, that concludes the
3 deposition of Dr. Gio Gori.

4 May we approach, Your Honor?

5 THE COURT:

6 Yes.

7 (Whereupon a bench conference is held at
8 this time as follows:)

9 MR. WITTMANN:

10 We have the video of Dr. Scheffman next.
11 We were going to start that tomorrow morning
12 since I think -- But it's up to Your Honor.
13 If you want us to keep going, we'll start
14 with the video now.

15 THE COURT:

16 How long is it?

17 MR. WITTMANN:

18 It's five hours.

19 MR. COPLEY:

20 It's a little over four hours, Your
21 Honor.

22 MR. WITTMANN:

23 Okay.

24 MR. COPLEY:

25 Your Honor, the qualifications take
26 approximately 35 minutes, the expert
27 qualifications. We can show those this
28 afternoon and break at that time.

29 You might remember from our hearing that
30 you asked us to pause the tape at that time
31 and then you would announce what he was an
32 expert in.

1 THE COURT:
2 Yes.
3 MR. COPLEY:
4 I brought that information for you.
5 THE COURT:
6 Yes.
7 MR. COPLEY:
8 So we could do that now, show the first
9 35 minutes.
10 THE COURT:
11 Okay. And that will probably take us to
12 3:30?
13 MR. WITTMANN:
14 Pretty much, yes.
15 MR. COPLEY:
16 It's exactly 35 minutes.
17 THE COURT:
18 Okay. Let's do that.
19 (Whereupon the bench conference is
20 concluded at this time.)
21 THE COURT:
22 We have a video about 35 minutes long.
23 And then we're going to recess, okay?
24 Are we ready, gentlemen?
25 MR. COPLEY:
26 Thank you, Your Honor.
27 Good afternoon, ladies and gentlemen.
28 THE JURY:
29 Good afternoon.
30 MR. COPLEY:
31 We're going to show the video of Dr.
32 David Scheffman. Dr. Scheffman is a Ph.D.

1 economist that -- The deposition was taken in
2 this case on June 21, 2001. So just about
3 two years ago.
4 It's a long video, I'll warn you ahead
5 of time. But we're going to show part of it
6 today and the rest of it tomorrow.
7 THE COURT:
8 Are we ready to proceed, Mr. Copley?
9 MR. COPLEY:
10 Yes, Your Honor.
11 (Whereupon the above-referenced
12 videotape is played back at this time as
13 follows:)
14 QUESTION: Good morning, Dr. Scheffman.
15 ANSWER: Good morning, Mr. Muehlberger.
16 QUESTION: Could you please state your
17 name for the record?
18 ANSWER: My name's David Scheffman.
19 QUESTION: Where do you live?
20 ANSWER: I live -- I'm in the process of
21 moving. I live still today in [DELETED],
22 but I'm moving at this moment. I hope the
23 movers are moving. I'm moving to [DELETED].
24 QUESTION: What do you do for a living?
25 ANSWER: I'm a consultant with the -- an

26 economic consulting company called LECG. And
27 I'm also a Professor of Business Strategy and
28 Marketing at Vanderbilt University in
29 Nashville, Tennessee.

30 QUESTION: Are you an economist?

31 ANSWER: I'm an economist.

32 QUESTION: What is an economist?

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1 ANSWER: Well, economists study various
2 aspects of the economy. Some economists,
3 most of the ones you read in the news, I
4 think, study unemployment rates and inflation
5 rates, interest rates, trends in the overall
6 economy. I study -- I'm an industrial
7 organization economist. I study industries
8 and companies. We study how industries
9 operate, how companies operate, how
10 competition works in different industries.

11 QUESTION: Dr. Scheffman, could you
12 please tell the jury a little bit about your
13 educational background?

14 ANSWER: I got a Bachelor's Degree in
15 economics and mathematics at the University
16 of Minnesota in Minneapolis. And then I went
17 on to Massachusetts Institute of Technology
18 and got a Ph.D. in economics.

19 QUESTION: Did you receive any special
20 honors in either your undergraduate or
21 graduate work?

22 ANSWER: My Bachelor's Degree was magna
23 cum laude. And then I was lucky to get a
24 National Science Foundation award to support
25 my study as a Ph.D. in economics at MIT.

26 QUESTION: What year did you receive
27 your Ph.D. degree?

28 ANSWER: 1971.

29 QUESTION: And have you been working as
30 an economist since 1971?

31 ANSWER: Yes, I have.

32 QUESTION: Is there any area of

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1 economics in which you specialize?

2 ANSWER: I am what you would call a
3 business economist. I study businesses and
4 industries in the broader area of economics.
5 That's part of industrial organization
6 economics, which is the study of competition
7 in industries and companies. I also have a
8 background and expertise in the area of
9 marketing.

10 QUESTION: Could you tell the jury what
11 industrial organization economics is?

12 ANSWER: Industrial organization
13 economics is the study of how markets
14 operate, how competition works, how
15 regulation impacts companies and industries.

16 QUESTION: Does that include
17 competition?

18 ANSWER: Yes. One of the central

19 focuses of industrial organization economics
20 is competition.

21 QUESTION: Does your subspecialty also
22 include understanding the effects of
23 regulations on businesses?

24 ANSWER: Yes. One of the major subareas
25 of industrial organization economics is
26 studying how regulation affects industries,
27 say, regulated industries like the telephone
28 industry, the electric industry, where there
29 is -- where the companies are explicitly
30 regulated by local authorities and rates are
31 set. And other industries that have other
32 sorts of regulations and taxes.

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1 QUESTION: When you analyze industries,
2 do you study the history of competition?

3 ANSWER: Yes. It's very important in
4 developing an understanding of how
5 competition works in an industry to go back a
6 considerable period of time in history to see
7 how competition has evolved, what the role of
8 the different companies have been, how
9 they've -- how that's changed over time, how
10 perhaps changes in regulations and taxes may
11 have affected the industries and the
12 companies.

13 QUESTION: Does your subspecialty also
14 include marketing?

15 ANSWER: Yes.

16 QUESTION: What is your background in
17 marketing?

18 ANSWER: Well, I've, for over twenty
19 years, I've been involved in various areas of
20 marketing. Economics and marketing come
21 together in many respects. In marketing --
22 In economics, we study advertising and
23 quantify advertising sales ratios and look at
24 data on how much people are exposed to
25 advertising.

26 I was at the Federal Trade Commission
27 for ten years. And we studied marketing in
28 connection with the Federal Trade
29 Commission's regulation of marketing
30 practices and advertising. Then I went --
31 When I went to the Vanderbilt University in
32 1989, I became a professor of business

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1 strategy and marketing and have taught for
2 many years and still teach courses on
3 marketing to M.B.A. students and to
4 executives.

5 QUESTION: Does your subspecialty also
6 include product innovation?

7 ANSWER: Yes.

8 QUESTION: And could you explain to the
9 jury what you mean by "product innovation"?

10 ANSWER: Well, in studying competition,
11 one of the most important forms of

12 competition, certainly these days and the
13 last few decades, is product innovation. The
14 introduction of new products and services is
15 one of the most important forms of
16 competition.

17 So in many contexts, as a matter of
18 industrial organization economics, we study
19 research and development, we study product
20 innovation. Then I've conducted many studies
21 of innovation in many industries, like the
22 soft drink industry, commercial aircraft,
23 Boeing, McDonnell Douglas, various aspects of
24 the computer industry. So in many
25 situations, I have studied specifically how
26 innovation works.

27 QUESTION: Okay. I want to now give the
28 jury an idea as to your employment
29 background. Could you tell the jury about
30 each of the positions that you've held since
31 you obtained your Ph.D. in 1971?

32 ANSWER: Well, while I was completing my
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1 Ph.D., I taught at Boston College, which is
2 in Boston, Massachusetts. Then I taught for
3 seven years in a university in Ontario in
4 Canada for seven years. Then I spent a year
5 at the University of Minnesota where I got my
6 B.A. as a visiting scholar.

7 Then I went to the Federal Trade
8 Commission, which is in Washington, D.C., in
9 1979, originally on leave from my academic
10 position. Then I ended up staying for ten
11 years. In 1988, I spent a year working as a
12 consultant visiting scholar with the U.S.
13 Sentencing Commission, which is a federal
14 government agency that oversees the
15 sentencing of violators under federal law.

16 And then in 1989, I was offered a
17 position as a chaired Professor of Business
18 Strategy and Marketing at Vanderbilt
19 University, which is in Nashville, Tennessee.
20 And I was there as a chaired faculty member
21 until the fall of 2000. And at that point, I
22 didn't want to be on-site anymore other than
23 to teach. So at that point, I became a
24 teaching faculty and fly into Nashville to
25 teach but I don't live in Nashville.

26 QUESTION: Okay. What did you do after
27 your university experiences then?

28 ANSWER: As I said, after teaching in
29 Ontario, I went to the Federal Trade
30 Commission and held various positions there
31 over a ten-year period.

32 QUESTION: What did you do after the
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1 FTC?

2 ANSWER: After the FTC, I went to -- I
3 joined Vanderbilt University. And since
4 becoming teaching faculty at Vanderbilt

5 University, I've become a consultant with --
6 affiliated with a company called LECG where I
7 do business and economic and litigation
8 consulting. And I also teach at Vanderbilt
9 University and at Cornell University in New
10 York.

11 QUESTION: Okay. What kind of courses
12 have you taught at Vanderbilt and Cornell?

13 ANSWER: I teach -- When I went to
14 Vanderbilt, I created the course called
15 Business Strategy or Strategic Management,
16 which we teach to M.B.A. students, which is
17 the study of marketing and business strategy
18 applied to actual business situations. So
19 I've taught that for now eleven years at
20 Vanderbilt. I teach that course, also,
21 starting this last spring at Cornell
22 University in New York.

23 And I've also taught a variety of
24 marketing courses having to do with pricing
25 and distribution. I also teach a course, a
26 three-day course, once or twice a year at
27 Vanderbilt. Business executives from
28 companies across the country come in and I
29 teach them about the latest developments in
30 marketing.

31 QUESTION: Okay. Do the courses that
32 you teach include product innovation?

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1 ANSWER: Yes. Product innovation,
2 again, is one of the key issues in our
3 economy and any industry. And so when we
4 teach business strategy, one of the important
5 elements of that is innovation, how to
6 innovate, how to innovate more effectively.

7 I've also led seminars teaching,
8 teaching companies on how to do the
9 innovation process, how to come up with
10 ideas, how to develop them effectively, how
11 to market the products and services that come
12 out of those ideas.

13 QUESTION: Have you published any
14 peer-reviewed articles relating to business
15 economics?

16 ANSWER: Yes, I've published more than
17 two dozen articles having -- in the area of
18 business economics.

19 QUESTION: Have you published any books
20 on business economic issues?

21 ANSWER: Yes, I've published about ten
22 books in the general area of business
23 economics.

24 QUESTION: Have you testified as an
25 expert in cases before the Federal Trade
26 Commission?

27 ANSWER: Yes, I've testified twice in
28 cases before the Federal Trade Commission.

29 QUESTION: And what were the subject
30 matters of that testimony?

31 ANSWER: One case involved allegations
32 of conspiracy. The Federal Trade Commission

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1 sued some companies that were -- that were
2 related to the oil industry, produced a
3 product that was used in gasoline, and had
4 sued them for allegedly conspiring.

5 In another case, the FTC had sued a
6 company, the company that makes Doan's back
7 pills, sued in connection with the
8 advertising of those pills.

9 QUESTION: Let's talk a little bit about
10 the consulting work that you do. You say you
11 are associated with a firm?

12 ANSWER: Yes, I'm associated with a firm
13 called LECG.

14 QUESTION: And what kind of work does
15 LECG do?

16 ANSWER: We're an economics and finance
17 consulting firm. We consult in three general
18 areas. My consulting's in three general
19 areas. Business consulting, that is, I
20 actually consult with business on areas and
21 issues related to business strategy,
22 marketing, product innovation, pricing of
23 products, strategic planning.

24 I also do consulting as a regulatory
25 consultant. As a regulatory consultant, I
26 work with companies or with regulators on
27 issues having to do with regulation. For
28 example, I might work with -- I've worked for
29 a number of companies who are thinking about
30 merging with a competitor and going over with
31 them economic issues as to whether the merger
32 might create antitrust problems.

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1 I've worked, say, for the State of
2 Alaska. When British Petroleum tried to
3 acquire ARCO, I worked on behalf of the State
4 of Alaska who was concerned about the merger,
5 how that merger would impact Alaska. So I've
6 done a lot of -- And I've worked in the
7 electric power industry and other sorts of
8 industries having to do with regulation.

9 And, finally, I work as a litigation
10 consultant, as a consultant or as an expert
11 witness, as in this case.

12 QUESTION: Can you give the jury an idea
13 as to some of the businesses for whom you've
14 done some business consulting and the types
15 of areas you've consulted with them on?

16 ANSWER: Okay. Well, I worked with,
17 say, both Coca-Cola and Pepsi-Cola, General
18 Mills, I worked with Boeing Aircraft, I've
19 worked with a number of small companies in
20 the Nashville and Tennessee -- in the
21 Tennessee area on issues related to pricing
22 and strategic planning, things like that.

23 QUESTION: What did you do for Coca-Cola
24 and Pepsi?

25 ANSWER: In Pepsi-Cola, I studied the

26 distribution system. I studied the whole
27 soft drink industry and actually wrote a book
28 about it, focusing -- a lot of the focus
29 being the distribution of soft drinks through
30 bottlers.

31 In Coca-Cola -- In the case of
32 Coca-Cola, I worked with them on trying to
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1 understand when their major competitor,
2 PepsiCo, had a new CEO come in, what they
3 could expect, what they should expect and
4 what changes that might mean as to what
5 PepsiCo might do differently and how that
6 might impact Coca-Cola.

7 QUESTION: Have you done business
8 consulting related to research and
9 development and product innovation?

10 ANSWER: Yes. In a lot of instances,
11 I've been very involved in product innovation
12 issues. In the soft drink industry, as I
13 said, I've -- as I said before, I've led
14 seminars for companies on how to do the
15 innovation process from how to come up with
16 ideas for how to get it into the marketplace
17 and, hopefully, be successful.

18 QUESTION: Let's turn to your work at
19 the Federal Trade Commission for a minute.
20 That goes by the shorthand version of FTC;
21 right?

22 ANSWER: Yes.

23 QUESTION: Okay. What is the FTC?

24 ANSWER: The FTC is a federal government
25 agency that's been around a long time,
26 practically a century. And it has two main
27 roles in the federal government: One, it's
28 one of the -- it's one of the agencies that
29 enforces the laws with respect to
30 competition, what we call antitrust; it also
31 is the main federal agency that is involved
32 in regulating areas related to consumer

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1 protection in the economy.

2 For example, it regulates -- it has
3 regulatory authority over credit, various
4 aspects having to do with credit cards and
5 bank loans and other sorts of things like
6 that. Warranties on consumer products is one
7 of the areas of the FTC. Another major area
8 of the FTC is advertising. The FTC is the
9 main agency in the federal government that
10 regulates the advertising of products,
11 including consumer products.

12 QUESTION: What enforcement powers does
13 the FTC have with respect to advertising
14 issues?

15 ANSWER: Well, the FTC, there's a law,
16 an FTC act under which the FTC has various
17 powers of regulation. And it has the power
18 to go in to sue companies over advertising.

19 If it -- If the Federal Trade Commission has
20 reason to believe the advertising is
21 misleading or deceptive or false or unfair,
22 the Federal Trade Commission has the power to
23 go into court and stop the advertising.

24 QUESTION: Where is the FTC located?

25 ANSWER: The FTC is located in
26 Washington, D.C.

27 QUESTION: Have you explained -- Have
28 you prepared some charts to help you explain
29 your experience at the FTC?

30 ANSWER: Yes, I have.

31 QUESTION: Would those help you in
32 explaining to the jury your positions and

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1 responsibilities at the Federal Trade
2 Commission?

3 ANSWER: Yes, I think so.

4 QUESTION: Okay. Now, does this first
5 chart list the positions you've held at the
6 FTC?

7 ANSWER: Yes, it does.

8 QUESTION: Okay. And could you describe
9 for the jury, please, each of the positions
10 that you had with the FTC during the time you
11 worked there?

12 ANSWER: Okay. Well, as you see, I
13 first went to the FTC in 1979 as a senior
14 economist. That was a senior Civil Service
15 nonmanagement position. And I worked
16 basically on consumer protection issues,
17 consumer warranties, advertising. I also
18 testified for the FTC when I talked before
19 about testifying in that case involving
20 allegations of conspiracy, during that time,
21 I testified for the FTC in my position as a
22 senior economist.

23 Then in 1983, I moved into a management
24 position. And I had this long title but,
25 essentially, what it was is I was the head
26 economist for competition matters at the FTC.
27 As I told you before, the FTC is one of the
28 main agencies in the federal government that
29 enforces the antitrust laws. And I was the
30 head economist in leading the economic parts
31 of investigation and litigation in support of
32 the Federal Trade Commission's enforcement of

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1 the antitrust laws.

2 QUESTION: Could I stop you there,
3 Doctor?

4 What does "antitrust" mean?

5 ANSWER: Antitrust is what we call --
6 There are government regulations that cover
7 how companies and industries compete. People
8 may have noticed in the news over the last
9 couple of years that a big software company,
10 Microsoft, has been sued by the federal
11 government. And the federal government is

12 trying to break up Microsoft. That's an
13 antitrust suit. The argument the FTC -- the
14 federal government believes that Microsoft
15 was a monopoly and it was abusing its
16 monopoly power, and so brought a suit, and is
17 attempting to break up Microsoft. That's an
18 example.

19 An important part of the -- of having
20 antitrust has to do with conspiracy or
21 collusion which are, among competitors, which
22 are illegal under the antitrust laws.

23 QUESTION: You mentioned "collusion."
24 What do you mean by that?

25 ANSWER: Well, the easiest example is a
26 group of competitors get together and fix
27 their prices jointly. That's a violation of
28 the antitrust laws.

29 QUESTION: Okay. I'm sorry for
30 interrupting you.

31 Could you go ahead and continue
32 explaining your positions and

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1 responsibilities at the Federal Trade
2 Commission?

3 ANSWER: Yes.

4 In 1985, I became the head economist of
5 the FTC. The FTC has many economists. It
6 had about ninety economists when I was there
7 that worked in support of the Commission's
8 consumer protection and antitrust enforcement
9 activities. And I became the head economist
10 at the FTC from 1985 until when I left in
11 1988.

12 QUESTION: Okay. What do economists do
13 at the FTC?

14 ANSWER: Well, economists are the number
15 and fact guys. We're sort of like
16 accountants, only we look at numbers much
17 more -- we look at accounting numbers but
18 much -- numbers much more broad than
19 accounting, as I said before, like inflation
20 and interest rates. But in terms of the FTC,
21 mostly what we're looking at, say, companies'
22 market shares, how much they spend on
23 advertising, where they're advertising,
24 things like that.

25 So what economists do is collect numbers
26 and facts. And then there are various
27 economic analyses we perform, supply and
28 demand analyses and things like that, that we
29 apply to the data and facts. And that
30 provides an economic background in support of
31 the Commission's activities.

32 For example, we might study, if the
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1 Commission believes some entities are working
2 together to try and some competitors are
3 working together illegally to raise the
4 prices, economists might look at the data --

5 would be looking at the data on pricing to
6 see whether that data indicates that they --
7 that the companies seem to be working
8 together to raise prices and then would
9 try -- might try to quantify how much prices
10 were actually raised, if they were.

11 QUESTION: Okay. Is the kind of
12 economic analysis that economists do at the
13 Federal Trade Commission similar to the work
14 that economists do outside the Federal Trade
15 Commission?

16 ANSWER: Yes. Studying industries and
17 competition and marketing issues, yes.

18 QUESTION: During the time you were at
19 the Federal Trade Commission, did you
20 personally work on investigations of
21 competition?

22 ANSWER: Yes, I worked on many dozens,
23 dozens of -- well, virtually hundreds of
24 investigations of various industries and
25 companies over the ten years I was there.

26 QUESTION: Could you just briefly give
27 the jury an idea of the kind of work you did
28 at the FTC regarding investigations of
29 competition?

30 ANSWER: Well, one of the main things
31 the federal government antitrust agencies do
32 these days is investigate mergers between

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1 competitors. Competitors can't merge -- You
2 can't merge with your competitor if it would
3 violate the antitrust laws, if the merger
4 would lessen competition in the industry.

5 So a lot of what the Federal Trade
6 Commission has done for the last fifteen
7 years is investigate mergers between
8 competitors and determine whether or not
9 those mergers can be allowed to proceed.

10 The FTC also has a lot of nonmerger
11 investigations of situations where it has
12 reason to believe that a group of competitors
13 may be getting together and reducing
14 competition. Or in situations where a
15 company is big enough maybe to have monopoly
16 power and is doing things to abuse that
17 monopoly power.

18 QUESTION: Did you personally work on
19 investigations involving advertising issues
20 when you were at the Federal Trade
21 Commission?

22 ANSWER: Yes.

23 Again, next to antitrust, advertising is
24 the second big area of enforcement
25 responsibility for the FTC. So we had a
26 number of investigations of advertising of
27 consumer and other products when I was there
28 that we worked on.

29 QUESTION: Okay. In investigating
30 claims relating to advertising, does the
31 Federal Trade Commission or do Federal Trade
32 Commission economists analyze the effect of

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1 the ads on consumers?

2 ANSWER: Yes.

3 In connection with, say, a false -- in
4 the situation where the FTC has reason to
5 believe that the advertising might be false
6 or misleading, economists will gather data on
7 sales of the product and who it's sold to,
8 the advertising, how much is spent on
9 advertising, where the advertising was
10 placed; will look at consumer surveys that
11 are typically done in such cases to survey
12 what people thought about the advertising,
13 whether they took away a false message or
14 whether the advertisement was misleading in
15 some respect that the -- that people took
16 away a meaning that wasn't -- that wasn't
17 correct; look at the -- try and estimate the
18 effect of, on sales, of the product of
19 advertising. Economists would be involved in
20 all those things.

21 QUESTION: Okay. And when you look and
22 analyze advertising issues at the FTC, do
23 economists also look at the other sources of
24 information a consumer is exposed to with
25 respect to a particular product?

26 ANSWER: Yes. One of the more elements
27 of determining whether consumers were misled
28 by particular advertising, say that you've
29 got an advertisement that doesn't really say
30 something that's false but might hint at
31 something and consumers might take away --
32 the concern would be that the consumers might

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1 take away a message which isn't really
2 correct, they then might act on that, say,
3 buy the product when, if they really had the
4 truth, they wouldn't buy the product.

5 Yes, in situations like that, you're
6 trying to analyze what people's -- what
7 people take away from an ad. And as part of
8 that process, you look at, well, what other
9 sources of information are consumers
10 confronted with? Like competitor ads.

11 Often, say, if Company X is saying our
12 widgets do such-and-such, other competitors
13 may be saying something different. And it
14 may -- it may drown out the effect of
15 whatever any particular company says about
16 its products.

17 It's also important in many products
18 what information consumers get from the
19 media, get from the government, get from
20 other sources in evaluating whether consumers
21 would be possibly misled by a particular ad.

22 QUESTION: Why is that important?

23 ANSWER: Well, it's very important
24 because when we're talking about misleading
25 advertising, the issue is, the central issue

26 is are people -- do people form beliefs or
27 impressions which are mis -- which are wrong
28 as a result of the ad?

29 And advertisements is just one thing
30 people see. They see lots of other things.
31 They read the newspaper, they listen to
32 radio, they look at TV, they may talk to

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1 their friends, et cetera. So you have to
2 look at all the information that people get
3 to understand whether people in a particular
4 context are misled by a particular
5 advertising campaign.

6 QUESTION: Do marketing principles teach
7 that different sources have different
8 credibility with consumers as far as
9 different products?

10 ANSWER: Yes, advertising has been
11 studied a lot because it's a big industry.
12 And we know, as a general matter, people are
13 skeptical about advertising. That's not to
14 say that people can't be misled by an
15 advertising campaign. But we know that
16 people are skeptical and that the skepticism
17 has increased over time.

18 We know that, in particular, where the
19 claims are about things that are really
20 important, like products that are really
21 expensive or products that might have safety
22 issues or health issues, that people rely
23 primarily on credible third-party sources
24 rather than the companies as to whether --
25 what -- whether the product is good for them
26 or not.

27 QUESTION: In conducting investigations
28 of possible conspiracy and misleading
29 advertising at the Federal Trade Commission,
30 did you also study the history of competition
31 in the subject industry?

32 ANSWER: Yes.

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1 QUESTION: Okay. And why did you do
2 that?

3 ANSWER: Well, again, in the misleading
4 advertising context or false advertising
5 context, you're trying to understand what
6 consumers are likely to -- what sort of
7 beliefs or impressions they're likely to
8 form.

9 And so part of that context of that is
10 understanding what sort of information have
11 they been exposed to in the past that's
12 relative -- relevant to that. Like what sort
13 of past advertising or what sort of past
14 information from other sources?

15 So, for example, if there have been
16 claims, you get a claim that the company -- a
17 product the FTC thinks maybe the advertising
18 is hinting this product will do this certain

19 thing that it doesn't do, you might in a
20 situation have a past history of ads that
21 were sort of like that by other competitors.
22 And you might be able to tell, well, do
23 people believe that the product does that
24 thing that we're concerned that it might be
25 hinting that it does? So looking at the
26 history of competition and advertising is
27 important.

28 QUESTION: Okay. What kind of work did
29 you do at the Federal Trade Commission
30 involving new product development?

31 ANSWER: Well, new product development
32 arises at the FTC primarily in connection
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1 with antitrust enforcement. The concern
2 often in a merger situation or in a
3 conspiracy situation is often whatever might
4 lead to a potential lessening of competition
5 like a merger or a potential conspiracy
6 between competitors, one of the important
7 issues might be: Will the rate of innovation
8 be different? Will the companies come out
9 with different products as a result of this
10 lessening of competition?

11 QUESTION: For approximately how many
12 industries did you look at product innovation
13 issues?

14 ANSWER: Probably dozens -- In dozens of
15 industries, I was involved in, we looked at
16 issues having to do with innovation in, say,
17 defense contracting, companies that produce
18 products for aircraft or for landing systems
19 for planes, for pharmaceutical products, for
20 consumer products, for a whole range of
21 industries.

22 QUESTION: Did your work at the Federal
23 Trade Commission give you insights into how
24 new products are developed?

25 ANSWER: Yes.

26 Because in connection with an antitrust
27 investigation, you collect -- you have a
28 major investigation and you collect data and
29 information from all sources, from public
30 source material, professional journals and
31 the company documents. You look at all sorts
32 of sources of information to understand how

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1 the innovation process works.

2 QUESTION: Does the Federal Trade
3 Commission regulate all advertising for all
4 consumer products?

5 ANSWER: Yes.

6 QUESTION: Okay. How long has the FTC
7 regulated cigarette advertising?

8 ANSWER: Well, the FTC's had enforcement
9 responsibilities with respect to advertising
10 for a long time. And really beginning in
11 1938 with the change in the law, the FTC has

12 had -- has very -- has had very strong powers
13 with respect to regulating of advertising of
14 consumer products.

15 QUESTION: Did the Federal Trade
16 Commission conduct any investigations of any
17 cigarette advertising while you worked there?

18 ANSWER: Yes. The FTC has long had a
19 regular monitoring program of cigarette
20 advertising, a group of people that actually
21 monitor the advertising in the cigarette
22 industry, and had a number of investigations
23 of cigarette advertising when I was there.

24 QUESTION: Did you study the history of
25 competition and regulation of advertising in
26 the cigarette industry when you worked at the
27 Federal Trade Commission?

28 ANSWER: Yes, we actually -- the
29 economists that worked for me, we actually
30 published a report on the history of the
31 regulation of cigarette advertising.

32 QUESTION: I understand that you've been
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1 offered a senior position in the federal
2 government as of June 25th of this year; is
3 that right?

4 ANSWER: Yes.

5 QUESTION: And once you're employed with
6 the federal government, is it your
7 understanding that you will not be able to
8 come to the trial of this case and appear as
9 an expert witness?

10 ANSWER: That's correct.

11 QUESTION: So we're presenting your
12 testimony to the jury today by way of
13 videotape; is that right?

14 ANSWER: Yes.

15 QUESTION: Okay. Let me turn for a
16 minute about your prior testimony. How many
17 cases have you been qualified in and
18 testified as an expert in trial?

19 ANSWER: About -- About nine times.

20 QUESTION: What areas has your testimony
21 been in as an expert at trial?

22 ANSWER: My expertise -- I'm usually
23 offering testimony as a business and
24 industrial organization economist and as an
25 expert in various aspects of marketing.

26 QUESTION: Have you testified for the
27 cigarette companies in a case before?

28 ANSWER: Yes.

29 QUESTION: How many trials have you
30 testified at involving the cigarette
31 companies?

32 ANSWER: Three.

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1 QUESTION: Have you also given some
2 depositions in other cases in addition to
3 that?

4 ANSWER: Yes.

5 QUESTION: About how many; do you
6 remember?
7 ANSWER: Well, I think, including the
8 three trial cases, I think I've had
9 depositions in seven matters.
10 QUESTION: And has your testimony in all
11 of those cases involved issues of
12 competition, business economics, industrial
13 organization economics and marketing?
14 ANSWER: Yes.
15 MR. MUEHLBERGER:
16 I offer Dr. Scheffman as an expert in
17 business economics, industrial organization
18 economics and marketing.
19 EXAMINATION BY MR. MURRAY:
20 QUESTION: Now, there are a lot of
21 different types of anticompetitive activity,
22 as I understand your testimony? There are
23 such things such as price-fixing and
24 fraudulent advertising and fraud?
25 ANSWER: Those all could be -- Those all
26 could be related to anticompetitive
27 activities, yes.
28 QUESTION: All right. Now, you've
29 indicated that there are regulated industries
30 and there are industries that are not
31 regulated?
32 ANSWER: Well, there are different --

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1 Most, most industries have some regulations
2 that affect them, whatever they are. But
3 there are some industries like telephone and
4 electricity which are really regulated, the
5 prices are set by the local regulatory
6 authority. And other industries where the
7 regulation is much -- is not as restrictive.
8 QUESTION: Now, you indicated that while
9 you were with the FTC, your entry position
10 was a Civil Service position; is that
11 correct?
12 ANSWER: Yes.
13 QUESTION: Explain to the jury the
14 difference between a Civil Service position
15 and a management position.
16 ANSWER: Oh, I'm sorry. They were both
17 -- I was always a Civil Service employee. I
18 said I went in as a senior -- as the most
19 senior level but I didn't -- as a nonmanager.
20 And then in 1983, I became a Civil Service
21 management position, that is, I had -- I was
22 responsible for managing a group of people.
23 In both cases, they were Civil Service.
24 QUESTION: Okay. So you weren't serving
25 at the pleasure of the President, so to
26 speak?
27 ANSWER: No.
28 QUESTION: Okay. Now, you indicated
29 that while you were with the FTC, you
30 investigated, among other things,
31 price-fixing?
32 ANSWER: Issues related -- Issues

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1 related to price-fixing, yes.

2 QUESTION: You were also involved in
3 advertising issues?

4 ANSWER: Yes.

5 QUESTION: Does the FTC publish
6 regulations that prohibit certain advertising
7 activity?

8 ANSWER: The FTC publishes what it calls
9 guidelines for a variety of industries and
10 for all industries outlining to companies and
11 industries these are -- these are the areas
12 -- these are the lines within which the FTC's
13 position is companies should stay in their
14 advertising or they would run the risk of
15 being sued by the FTC for false or misleading
16 advertising.

17 QUESTION: Do you require that
18 advertisers submit to the FTC proposed
19 advertising in order to get the FTC's
20 approval or declaration as to whether it
21 violates your guidelines?

22 ANSWER: Right.

23 My experience is companies don't --
24 aren't required to pre-clear their
25 advertising with the FTC. But in many cases,
26 they do. If they think it's in a gray area,
27 if they think it's an area in which the FTC
28 might think that the advertising is false or
29 misleading, they on many occasions do come in
30 to the FTC and say, "These are -- This is the
31 sort of ad we're going to run, we're thinking
32 of running. Do you have a problem with it?"

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1 But they're not required to pre-clear their
2 advertising.

3 QUESTION: And, in fact, the FTC cannot
4 prohibit the placement of an advertising? Of
5 an advertisement?

6 ANSWER: It would have to go -- It would
7 have to go into court to sue to stop the
8 advertising. The reality is usually when the
9 FTC says, "We don't like the ad and we're
10 going to sue you if you don't stop it," in
11 most cases companies stop the ads.

12 QUESTION: But in some cases, if the
13 company disagrees with the FTC and says,
14 "This isn't false or misleading and we think
15 you're wrong or your guidelines are wrong,"
16 they can publish that advertisement and the
17 FTC's only recourse is to bring a suit?

18 ANSWER: Yes, they can do that. But,
19 actually, the experience usually is, even
20 when the company says, "No, there's nothing
21 wrong with this ad" and the FTC sues,
22 typically, companies actually end up removing
23 the ad. But pursuing the case, nonetheless,
24 saying that "We didn't really violate the law
25 and we're going to fight you in court." That

26 does happen. And sometimes the ad remains in
27 place and the issue is resolved in court.
28 QUESTION: The position that you are
29 accepting this month with the federal
30 government, is that a Civil Service position?
31 ANSWER: Yes.
32 QUESTION: Can you tell us what the
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1 position is?
2 ANSWER: I'm going back to become the
3 head economist again at the Federal Trade
4 Commission.
5 MR. MURRAY:
6 We accept Dr. Scheffman as an expert as
7 tendered.
8 (Whereupon the playback of the above-
9 referenced videotape is concluded at this
10 time.)
11 MR. COPLEY:
12 Your Honor, that concludes the
13 qualifications.
14 THE COURT:
15 Okay. The Court will recognize the
16 witness as an expert in business economics,
17 industrial organization economics and
18 marketing.
19 And we will recess for the afternoon at
20 this point, and we'll resume tomorrow morning
21 at 9:30 with this witness' direct testimony
22 by video.
23 See you then.
24 (Whereupon the jury is excused at this
25 time.)
26 THE COURT:
27 Let the record reflect the jury has left
28 the courtroom.
29 Anything for the record by plaintiffs
30 before we recess?
31 MR. RUSS HERMAN:
32 Yes, Your Honor.

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1 Most respectfully, with regard to Dr.
2 Scheffman's testimony, we again place our
3 objections on the record regarding The
4 Court's rulings that we are not allowed to
5 examine the witness or to present the amount
6 of advertising dollars spent by the cigarette
7 companies.
8 Despite the cigarette companies'
9 assertions of free speech in this case and
10 their assertions of advertising preemption,
11 they have continued to offer and will offer
12 advertising information, but the full story
13 is not being exhibited to the jury.
14 Most respectfully, Your Honor, not only
15 has there been testimony brought forth by the
16 companies as to the amount of dollars they
17 have spent on research; but, beyond that, the
18 impact of advertising is based upon the

19 media, the message and, most importantly, the
20 amount of dollars spent in repetition of the
21 message.

22 We understand Your Honor's ruling. We
23 make this assertion for the purposes of
24 continuing to preserve our position for the
25 record.

26 Also, Your Honor, it's not necessary to
27 put on the record but I was going to make a
28 phone call to determine from Mr. Richardson
29 and Mr. Steve Herman as to what progress
30 they've made on the Philip Morris depo cuts
31 so that we can be advised and The Court can
32 be advised of what may come before The Court

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1 next week.

2 MR. COPLEY:

3 Your Honor, actually, I have information
4 on that.

5 MR. RUSS HERMAN:

6 Okay.

7 MR. COPLEY:

8 Mr. Steve Herman and Mr. Richardson have
9 resolved most of the issues regarding the
10 four Philip Morris depositions and will not
11 require a hearing before The Court. There
12 may be a couple of issues that we can take up
13 at a break during testimony, but it will not
14 require a separate hearing.

15 THE COURT:

16 Mr. Gianna has volunteered to make some
17 informal attempts to get the parties at a
18 common ground if there are some issues left
19 in those depositions and short of a formal
20 hearing and short of a formal record, if you
21 would like to consult with him.

22 MR. COPLEY:

23 I understand we're very close, Your
24 Honor.

25 THE COURT:

26 All right. Fine.

27 Anything more by plaintiffs' counsel?

28 MR. RUSS HERMAN:

29 No, Your Honor.

30 We just need to be advised tomorrow of
31 what the defendants are going to do next
32 week. And I've requested to know what live

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1 witness or witnesses are going to be called
2 the week after because of the Mother's Day
3 situation and the short week that we
4 discussed in chambers.

5 THE COURT:

6 Yes.

7 Anything by defense counsel?

8 MR. WITTMANN:

9 No, Your Honor.

10 THE COURT:

11 All right. We'll recess until tomorrow

12 at 9:30.
13 (Whereupon the proceedings were
14 adjourned at 3:34o'clock p.m.)
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1 REPORTER'S CERTIFICATE
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